Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALMA ROMERO
Petitioner,

v.

JOSEPH LOPEZ AND THE CITY OF SAN DIEGO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KEITH H. RUTMAN
Counsel of Record for Petitioner
2442 Fourth Avenue
San Diego, California 92101
Telephone: (619) 231-8872

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QUESTIONS PRESENTED FOR REVIEW

While Petitioner ALMA ROMERO's car was standing in a red zone so she could load luggage into it, Respondent, San Diego Police Officer JOSEPH LOPEZ, told Petitioner not to move her car so that he could issue a parking citation, which under California law is subject to only a civil penalty. When Petitioner tried to move her car into a loading zone, she was arrested for violating California Penal Code § 148, which criminally punishes any person who "wilfully resists, delays or obstructs any public officer . . . in the discharge or attempt to discharge any duty."

This Court is asked to decide the following:

1. Whether the Fourth Amendment prohibits the detention or seizure of an automobile (and, as a result, the driver) by a police officer for purposes of gathering information necessary to execute civil process in the form of a non-criminal parking, as opposed to a traffic, citation.

2. If not, whether the Fourth Amendment prohibits the criminal prosecution of a citizen who attempts to move a vehicle under such circumstances.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, ALMA ROMERO (hereinafter Petitioner), respectfully prays that a Writ of Certiorari issue to review the Judgment and Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit filed on February 14, 2000.

OPINION(S) BELOW

On February 14, 2000, the Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the judgment entered by the district court following a jury trial. A copy of this decision is attached as Appendix A-1 through A-4 (hereinafter referenced as A-1 through A-8.)

On November 24, 1997, Petitioner had filed a Motion for Summary Judgment raising the issue addressed herein. On February 4, 1998 the district court denied the motion. A copy of this decision is attached as Appendix A-9 through A-17.

STATEMENT OF JURISDICTION IN THIS COURT

The Memorandum Opinion of the Ninth Circuit affirming in part and reversing in part the judgment entered by the district court was entered on February 14, 2000. No Petition for Rehearing was filed, and no request to stay the mandate was filed. The mandate was spread in the district court on March 27, 2000.

Pursuant to Supreme Court Rule 13, this Petition for Writ of Certiorari is filed within ninety days of the filing of the Ninth Circuit's Memorandum Opinion.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). Petitioner maintains that the Ninth

Circuit Court of Appeals has decided an important federal question that has not been, but should be, settled by this Court and has decided an important federal question in a way that conflicts with relevant decisions of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Appendix hereto contains the pertinent text of the following statutory provisions:

1. California Penal Code § 148 and California Vehicle Code § 2800, which formed the purported legal justification for Petitioner's arrest.
2. California Penal Code § 836, which authorized Respondent LOPEZ to arrest Petitioner.
3. Division 17, Chapter 1, Article 3 of the California Vehicle Code, beginning at § 40200 through and including § 40230, sets forth the exclusive means by which violations of non-misdemeanor parking regulations enacted by municipalities in the State of California are to be enforced and adjudicated.
4. California Vehicle Code and San Diego Municipal Code sections relating to parking enforcement and the collection and distribution of proceeds from the enforcement

of parking violations.

STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction

1. District Court

On May 19, 1997, Petitioner filed a Complaint for Damages in the U.S. District Court for the Southern District of California. The complaint alleged causes of action for civil rights violations arising under 42 U.S.C. § 1983 and state law based causes of action. The gravamen of the complaint was false arrest and excessive force. The district court had original jurisdiction pursuant to 28 U.S.C. §1331, § 1343(4), 1367 and 42 U.S.C. § 1983. An Answer was filed on May 10, 1997.

On November 24, 1997, Petitioner moved for summary judgment on her false arrest claim(s), asserting that since no crime was committed, neither she nor her car could be seized or detained. Since her conduct was constitutionally privileged, Respondent LOPEZ could not lawfully arrest her for a violation of § 148 (or Vehicle Code § 2800). F.R.C.P. 56(c).

Neither the district court nor Respondents specifically addressed this issue. Rather, Respondent's opposition to the motion centered on their assertion that Respondent LOPEZ did not arrest Petitioner for parking in a red zone, but rather that he had probable cause to arrest Petitioner under California Penal Code § 148 in that she allegedly ignored his direction not to move her car while he was preparing to issue her a parking ticket for standing in a

red zone.[1] Respondents admitted Petitioner was free to leave[2], but until Respondent LOPEZ issued a parking citation, she could not move or take her car. (See A-12 through A-20)

Petitioner replied that any facts regarding the incident raised by Respondents, including whether or not Petitioner was "backing in the wrong direction on a one way street, raised her voice, grabbed her steering wheel, or resisted efforts to be pulled from the car" were irrelevant to the issue.[3]

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[1] At the summary judgment stage, Respondents asserted Petitioner was also subject to arrest for violating Vehicle Code § 2800, which makes it unlawful to "wilfully fail or refuse to comply with any lawful order, signal, or direction of any peace officer . . . when that peace officer is in uniform and is performing duties under any of the provisions of this code, or to refuse to submit to any lawful inspection under this code."

Petitioner agrees that she would have been subject to arrest if the order not to move her car was lawful, which is the subject of the instant Petition.

[2] Petitioner was clearly seized when Respondent LOPEZ opened her door and grabbed her arms in order to take her into custody for violating § 148. California v. Hodari D., 499 U.S. 621 (1991)(application of physical force constitutes seizure).

[3] See Katz v. United States, 194 F.3d 962 (9th Cir. 1999)("appellate court has jurisdiction to consider assertion that disputed issue of fact is not material.")

On February 4, 1998 the district court issued a written ruling denying the motion. It found a disputed issue of material fact lie in whether "Petitioner heard his (Respondent LOPEZ's) command to stop the car and exit the vehicle, that she acknowledged him and refused to comply . . . (and) physically resisted his subsequent arrest." See A -9.[4]

On the eve of trial, the district court dismissed the 42 U.S.C. § 1983 based false arrest claims pursuant to Heck v. Humphrey, 512 U.S. 477 (1994) due to Petitioner's plea to disturbing the peace in violation of California Penal Code § 415(1), an infraction. Sua sponte, the district court also dismissed the state law based false arrest claim..

On April 14, 1998, a jury was empaneled to hear Petitioner's excessive force claims. Petitioner moved for judgment as a matter of law on her false arrest claims under F.R.C.P. 50, but the motion was denied without comment.[5] On April 22, 1997, the jury found for Respondents. Judgment was entered in the district court on May 6, 1998.

2. Court of Appeals

Jurisdiction in the Court of Appeals was invoked

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[4] Petitioner believes these facts were immaterial to the issue of whether Respondent LOPEZ had the constitutional authority to command Petitioner not to move the car.

Moreover, contrary to the district court's ruling, neither party contended that Petitioner was arrested for "physically resisting her subsequent arrest."

[5] For some reason, this motion, heard at sidebar, was not recorded.

under F.R.C.P. 54 and 58, and 28 U.S.C. § 1291 and § 1294(1). The Notice of Appeal was timely filed on May 8, 1998. Fed. R. App. P. 4(a).

Petitioner asserted because Respondent LOPEZ had no probable cause to believe that her car was evidence of a crime or contained evidence of a crime, he could not lawfully detain it for purposes of issuing a non-criminal parking citation under California Vehicle Code § 40202.

On February 14, 2000, the Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the judgment entered by the district court following a jury trial. Specifically, it ordered the reinstatement of the state law based false arrest claim. It affirmed the denial of the motion for summary judgment, finding that Petitioner had failed to demonstrate that her arrest was illegal as a matter of law. Specifically, the Ninth Circuit ruled that Petitioner failed to establish a "right to flee the scene with her vehicle under Vehicle Code § 40202." As such, she could not assert that her conduct in moving the car was privileged under the Fourth Amendment. (see A-3)

Pursuant to the instructions of the Court of Appeals, the district court exercised its discretion under 28 U.S.C. § 1367(c)(3) and determined it would not retain jurisdiction of the only surviving cause of action, a state law based cause of action for false arrest, and dismissed the case without prejudice to refiling in the Superior Court. The action was refiled in the California Superior Court for the County of San Diego on April 11, 2000. No trial date has yet been set.[6] Hence, this petition is ripe for review.

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[6] If this petition is granted, Petitioner will seek a stay of any further proceedings in the Superior Court.

B. Statement of Facts

Petitioner submits that although the legality of her arrest was never decided by a jury, this Court may properly decide the matter on the basis of the following undisputed facts[7] presented to the district court at the summary judgment stage of the proceedings:

1. On December 3, 1996, Petitioner and her mother returned to San Diego from a trip to Brazil. Petitioner, a sales manager then employed by the Westin Hotel (formerly the Doubletree) located at 910 Broadway Circle, had parked her car in the Westin's garage and she and her mother took a taxi to and from the airport. See A-25.

2. Once the taxi dropped them off in front of the U.S. Post Office located next to the hotel, she left her mother and a large amount of luggage on the sidewalk. She retrieved her car, parking it (with the keys in the ignition) in the exact same spot where the taxi had pulled over to drop them off. She opened the trunk, got out of the car and began loading the luggage into the trunk. See A-25 through 26.

3. Petitioner's car was parked in a red "no parking" zone. See A-26.

6. She had difficulty backing up because a white vehicle was blocking her path. This vehicle was driven by Detective Boyd. See A-28.

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[7] Referenced according to their number originally assigned to them.

7. Respondent LOPEZ pulled her from her car and arrested her for a violation of Penal Code § 148, delaying an officer. See A-28.

10. Petitioner, like any other citizen, has the right to leave while a parking citation is being issued. See A-29.

11. The information Respondent LOPEZ was required to obtain by the Municipal/Vehicle Codes was visible, i.e., not obstructed from view. See A-29.

12. Petitioner was handcuffed by Respondent LOPEZ, who subjected her to a full custodial arrest. See A-29.

13. Respondent LOPEZ did not attempt to cite and release Petitioner in accordance with Penal Code § 853.6. See A-29.

The following facts were disputed at the summary judgment stage, however, Petitioner contends none were material to the issue of whether Respondent LOPEZ could, without violating the Fourth Amendment, order Petitioner not to move her car[8].

4. Respondent LOPEZ parked his motorcycle in front

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[8] These facts were presented to the district court in connection with another issue not before this Court, to wit, whether Respondent LOPEZ was required to "cite and release" Petitioner in accordance with Penal Code § 853.6(i).

See footnote 3.

of her car, and immediately began yelling at Petitioner that she was parked in a red zone. Petitioner apologized and said that she would finish packing her car and move the car. Respondent LOPEZ stated "that's too bad, its going to cost you $60.00. MOVE IT!!!" Petitioner then ceased loading the luggage (she was about halfway done) and, after telling her mother that she was going to move the car, attempted to move it as directed. Specifically, she wanted to back up into the hotel traffic circle, which is a passenger loading zone. See A-26 through 27.

5. While backing up her car, she drove over an item of her luggage because she was in a hurry to comply with Respondent LOPEZ's order. See A-27.

8. Petitioner had committed no other offenses which would subject her to arrest.[9] See A-28.

9. An officer issuing a parking citation need not obtain a VIN number or expiration date in every instance. See A-28 through 29.

14. The seven factors listed in Penal Code 853.6(I) did not apply to Petitioner's situation. See A-30.

15. Respondent LOPEZ never asked Petitioner for identification. See A-30.

In their opposition to Petitioner's summary judgment motion, Respondents asserted the following "Additional Material Facts":

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[9] See footnote 1.

16. Respondent LOPEZ attempted to issue a parking citation to the car Petitioner was in control of after Petitioner failed to move the car as requested by Respondent LOPEZ. Petitioner was not free to take the car until Respondent LOPEZ had gathered the information necessary to issue the car a citation. See A-31.

Whether Petitioner was free to take the car is the crux of the instant matter. Whether she initially failed to move the car, a fact she disputes[10], is not material to this legal issue.

17. Respondent LOPEZ instructed Petitioner not to move the car because he had not been able to write down any of the car's identifying information necessary for the issuance of the citation. See A-31.

The legality of Respondent LOPEZ's instructions not to move the car is, again, the determination this Court is being asked to decide. Why he instructed her is not material to this question. (but see item number 11 above)

18. Petitioner ignored Respondent LOPEZ's orders not to move the car, entered the car and began to back away from Respondent LOPEZ. Petitioner also ordered Respondent LOPEZ's order to stop and exit the car. Therefore, Respondent LOPEZ was forced to pull Petitioner from the car over her resistance and place her under custodial arrest. It was clear that Petitioner was not going to comply with Respondent LOPEZ's orders and the offense was going to

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[10] Rather, she contended she was in the process of doing so when she was arrested.

continue. Therefore, she was not given a misdemeanor citation and released. See A-31 through 32. .

Although Petitioner did in fact move the car, whether she was exercising her Fourth Amendment rights, and hence not obligated to comply with an order she asserts was unlawful, is the crux of the instant matter. The remaining facts are not material to this determination.[11]

The parties stipulated that Respondent LOPEZ was acting within the course and scope of his employment and acting under color of law when he arrested Petitioner.

C. The Fourth Amendment Prohibits the Detention or Seizure of an Automobile by a Police Officer for Purposes of Gathering Information Necessary to Execute Civil Process in the Form of a Non-criminal Parking Citation.

1. Introduction

An arrest made without an arrest warrant is presumed violative of the Fourth Amendment. The burden of proof then shifts to the State to establish that an arrest was based upon a recognized exception to the warrant requirement. Mincey v. Arizona, 437 U.S. 385, 390 (1978)

Whether an officer is authorized to make an arrest or detention ordinarily depends, in the first instance, on state law. Michigan v. DeFillippo, 443 U.S. 31, 36 (1978).

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[11] Petitioner has omitted any discussion of the details of her transportation, booking, damages, and impeachment of Respondent LOPEZ by virtue of uncorroborated statements set forth in his police report.

There are basically three different levels of police contacts with individuals: (1) consensual encounters; (2) detentions, which are seizures strictly limited in duration, scope and purpose and may be conducted upon an articulable suspicion that a person has committed or is about to commit a crime; and (3) arrests, which are seizures exceeding the permissible limits of a detention involving restraint comparable to a formal arrest and require probable cause to believe the suspect has committed a crime. Florida v. Royer, 460 U.S. 491, 498 (1983)(holding that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. Any 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.'); accord Ybarra v. Illinois, 444 U.S. 85 (1979)(search warrant for tavern does not permit body searches of tavern's patrons in the absence of individualized suspicion (i.e. probable cause) to believe patrons are in possession of evidence of a crime or contraband.)

A detention is permissible if reasonable suspicion, as defined by Terry v. Ohio, 392 U.S. 1 (1968), exists to suspect criminal activity is underway.

Probable cause, as defined by Illinois v. Gates, 462 U.S. 213 (1983), requires belief that a criminal offense has been or is being committed.

Prior to 1992, Vehicle Code § 40200 provided that the driver of an illegally parked vehicle could be criminally prosecuted for an infraction. People v. Levinson 15 Cal.App.4th Supp. 15 (1993).

Vehicle Code § 40200 currently provides that any violation of any regulation that is not a misdemeanor governing the standing or parking of a vehicle under this code is subject to a civil penalty, enforcement of which shall be governed by the civil administrative procedures set forth elsewhere. The registered owner and driver, rentee, or

lessee are jointly liable for parking penalties. [12]

Pursuant to Vehicle Code § 22507, § 21458 and San Diego Municipal Code § 86.09, parking in a red zone is a civil offense subject to civil penalties and administrative enforcement. Tyler v. County of Alameda, 34 Cal.App.4th 777, 782 (1995).

A fully completed parking citation is not a jurisdictional requirement in proving a parking violation; rather, the purpose of the information requirement is to permit identification of the vehicle and sufficient information to prove that a violation has been committed. People v. Levinson, supra.

Petitioner contends that the decision of the California Legislature to decriminalize parking related offenses, thereby distinguishing them from traffic offenses, requires that the Fourth Amendment operate as a restriction on the conduct of police officers and Code Enforcement Officers [13] to detain vehicles which might be so parked, unless some other basis for seizure exists.[14]

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[12] Municipal Code § 82.07, which has not been amended to reflect the change in the Vehicle Code, does not provide for such an alternate means of giving notice to the owner.

[13] See California Penal Code § 836.5(d) and San Diego Municipal Code § 12.0105, which authorize Parking Enforcement officers to make detentions for violations of Penal Code § 148.

[14] See Vehicle Code § 22651. Respondents never presented any evidence that any of the factors specified therein would have justified the seizure of Petitioner's car.

2. Vehicles May Be "Seized" Within the Meaning of the Fourth Amendment Only If There Is Reasonable Suspicion or Probable Cause to Believe There Has Been a Violation of Traffic and Vehicle Safety Regulations or That Contraband or Evidence of a Crime May Be Found Within.

a. Traffic and Vehicle Safety Regulations

Warrantless seizures of vehicles have been permissible for over 75 years. In Carroll v. United States, 267 U.S. 132, 153 (1925), this Court established an exception to the warrant requirement for moving vehicles when it recognized:

> "a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

This Court therefore held in the light of an exigency arising out of the likely disappearance of the vehicle, a warrantless search of an automobile, based upon probable cause to believe that the vehicle contained evidence of crime, did not contravene the Warrant Clause of the Fourth Amendment. Id. at 158-159.

This Court subsequently extended the justification for the lack of a warrant to include the reduced expectation of privacy which flows from the "configuration, use and regulation of automobiles." Arkansas v. Sanders, 442 U.S.

753, 761 (1979)

The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 653 (1979)[15]. Despite the pervasive regulation of automobiles, such seizures are scrutinized under normal Fourth Amendment probable cause principles. Whren v. United States, 517 U.S. 806, 819 (1996)("The making of a traffic stop . . . is governed by the usual rule that probable cause to believe the law has been broken "outbalances" a private interest in avoiding police contact.")

In Delaware v. Prouse, supra, this Court invalidated a search where an officer stopped vehicle on an apparent

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[15] See Soldal v. Cook County, 506 U.S. 56 (1992)(A property seizure will be more strictly scrutinized when it is tantamount to a seizure of the person.)

Here, Respondents agreed Petitioner herself was not detained and was free to go even if she was parked in a red zone. They also agreed that Respondent LOPEZ ordered her not to move the car, and that it was her moving the car (which he claims prevented him from gathering the necessary information) justified her arrest under Penal Code § 148. A-13. However, by seizing her car, as a matter of law she was also seized, as no reasonable person in such circumstances, let alone one with a large amount of luggage sitting on the sidewalk, would feel reasonably free to leave. Florida v. Bostick, 501 U.S. 429 (1991); United States v. Sharpe, 470 U.S. 675 (1985); United States v. Chan-Jiminez, 125 F.3d 1324 (9th Cir. 1997)

whim, finding the traffic stop was unreasonable under the Fourth Amendment because there was no reasonable suspicion that a criminal law had been violated. The officer testified that, prior to stopping the vehicle, he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and the car's registration.

This Court found that this was an illegal seizure, holding that a police officer may not lawfully stop a car where there is neither probable cause nor reasonable suspicion to believe that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law.

This Court stated:

> . . . We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed.
>
> The question remains, however, whether, in the service of these important ends, the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail. On the record before us, that question must be answered in the negative. Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway

safety of the random spot check justifies the practice under the Fourth Amendment.

Delaware v. Prouse, supra, 440 U.S. at 657.

accord United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)(except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.)

In Whren v. United States, supra, wherein this Court ruled that an officers subjective motivations are irrelevant to his decision to stop a vehicle so long as, objectively viewed, probable cause existed to stop the car to enforce traffic laws, this Court noted that "Petitioners accept that Officer Soto had probable cause to believe that various provisions of the District of Colombia traffic code had been violated." Those provisions were "civil" in nature, that is, the violators were, as is the case here, only subject to a civil penalty and not criminal punishment. D.C. Municipal Code § 40-624.

However, unlike the Petitioners in Whren, Petitioner does not concede that "probable cause" existed as this Court has consistently defined the term. The offenses at issue in Whren, negligent operation of a motor vehicle, failure to signal when turning, and speeding, all involved the operation of an automobile on public streets, all took place in the midst of "traffic" and implicated the "safety" of other motorists, as permitted by Prouse.[16]

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[16] In Washington D.C., reckless driving (either in the form of speeding or the operation of the

In this instance, there were no facts to suggest that the safety of other motorists was implicated by the fact that Petitioner's car was standing in a rd zone. In fact, Officer Boyd was not hindered in his ability to drive past Petitioner's car, so no traffic concerns were implicated. Rather, this case is a "random" stop in the sense that there was no "probable cause," as defined by the "traditional common-law rule", to believe that traffic and vehicle safety regulations, contraband or evidence of a crime may be found within.

As such, Respondent LOPEZ could not lawfully direct Petitioner not to move the car, regardless of his purpose.[17]

b. Evidence of a Crime or Contraband

Absent probable cause or reasonable suspicion to believe there has been a violation of a "traffic or vehicle

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automobile in any other way), is a misdemeanor subject to criminal sanctions. D.C. Municipal Code § 40-712. In Whren, depending upon the manner of the operation fo the vehicle, Officer Soto could have had probable cause to believe a misdemeanor had been committed. The opinion is silent on the exact manner of the driving or whether the arresting officer ever considered such misdemeanor charges in light of the discovery of crack cocaine.

[17] Nor could he claim that the seizure was for purposes of inspection, given Respondents' concession that "The information Respondent LOPEZ was required to obtain by the Municipal/Vehicle Codes was visible, i.e., not obstructed from view." See A-18.

safety regulations", seizures of vehicles can be justified on the additional grounds.

A warrantless seizure is justified if the vehicle itself is contraband or subject to forfeiture. Florida v. White, 526 U.S. 559 (1999)

If there is probable cause or reasonable suspicion to believe a vehicle contains evidence of a crime or contraband, it can be seized without a warrant. United States v. Ross, 456 U.S. 798 (1982); California v. Acevedo, 500 U.S. 565 (1991); Wyoming v. Houghton, 526 U.S. 295 (1999); but see Knowles v. Iowa, 525 U.S. 113 (1998)(determining that there are limits to the authority of the police to conduct warrantless searches or seizure of automobiles, this Court held that a statute which permitted the search of a vehicle stopped for a speeding as "incident to arrest" violated the Fourth Amendment in that it purported to authorize a search in the absence of probable cause to believe evidence of a crime (specifically, the crime which justified the stop) would be located. Neither speculative concerns of "officer safety" nor a claimed "need to preserve evidence" were sufficient to render the statute constitutional.)

The instant case presents one more logical limitation on the reasonableness of a warrantless seizure of a vehicle.

3. None of the Limited Circumstances in Which Seizures under the Fourth Amendment Do Not Require Reasonable Suspicion or Probable Cause Apply to this Case.

a. Motorists

In Maryland v. Wilson, 519 U.S. 408, 415 fn.3 (1997), this Court extended the ruling in Pennsylvania v. Mimms, 434 U.S. 106, 111 fn.6 (1977), which allowed the police to order a lawfully detained motorist from his vehicle for purposes of officer safety to passengers, even absent

individualized suspicion to believe the passenger had violated the law.

However, this Court declined to consider whether a passenger could be thereafter prohibited from leaving.[18]

In this instance, Respondents never asserted "officer safety" justified the seizure of the vehicle. They expressly conceded that Petitioner herself was not being detained. A-18, item number 10.

b. Pervasively Regulated Industries

Administrative searches of pervasively regulated industries will be justified on the basis of fire, health or safety concerns. However, absent a warrant, exigent circumstances or consent is required. None of these factors applies here. See Conner v. City of Santa Ana, 897 F.2d 1487 (9th Cir. 1990)(warrant required in nuisance case); United States v. Bulacan, 156 F.3d 963, 967(9th Cir. 1998)(district court properly suppressed methamphetamine seized after warrantless search at federal building on grounds that regulation authorizing warrantless search violated Fourth Amendment.)

The fact that an automobile is heavily regulated justifies the lack of a warrant, but cannot justify the fact of the seizure itself. Delaware v. Prouse, supra, 440 U.S. at pages 662-663 ("An individual operating or travelling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation."(footnote omitted)

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[18] In both cases, the motorists had been initially been stopped for criminal traffic violations (expired license plate and speeding.) In both, this Court was concerned with the state's heavy interest in officer safety.

See also Nelson v. City of Irvine, 143 F.3d 1196 (9th Cir. 1998)(rejecting argument that pervasive regulation surrounding automobiles justifies suspicionless detentions. "It is untenable to equate police DUI traffic stops with the pervasively regulated environment where special needs can justify even suspicionless drug testing)

c. Community Care Taking Function

In Cady v. Dombrowski, 413 U.S 433, 441-442 (1972), this Court, in discussing a "community care taking function" noted that "often, noncriminal contact with automobiles will bring local officials in plain view of evidence, fruits or instrumentalities of a crime or contraband." In this case, Respondent LOPEZ did not testify as to the plain view of evidence, fruits or instrumentalities of a crime or contraband

In South Dakota v. Opperman, 428 U.S. 364, 368-371 (1976), while upholding an inventory search of a vehicle, this Court noted that "The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." Here, there was no evidence or contention that Petitioner's car impeded traffic or threatened public safety and convenience. To the contrary, Officer Boyd was able to drive his vehicle without impediment. Moreover, the police departed the scene without impending Petitioner's car.

In People v. Ray, 21 Cal.4th . 464 (1999), the California Supreme Court noted that the "community care taking exception" implicates activities which do not involve "crime solving activities", but rather circumstances which "reduce the opportunities for the commission of crimes, aid individuals who are in danger of physical harm, assist those who cannot care for themselves, resolve conflicts, create and maintain a feeling of security, and provide other services on an emergency basis." None of those additional factors was

implicated herein.

d. Public Safety

In Skinner v. Railway Labor Executives Union, 489 U.S. 602 (1989) and National Treasury Employees Union v. Von Rabb, 489 U.S. 656 (1989), this Court upheld drug testing of federal employees)[19]. Respondents never asserted below that public safety was at issue.

In Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990), relying upon a Terry balancing test, this Court held that temporary, fixed sobriety checkpoints do not violate the Fourth Amendment even though no particularized suspicion of criminal activity exists. This Court balanced the limited intrusion to the motorist, combined with the minimal potential for abuse of authority against the heavy state interest in eradicating drunk driving, which is a criminal offense in every state. This case only involves a revenue generating parking violation.

4. Prosecutions of Individuals May Be Prohibited If the Offense in Question Is Based upon the Exercise of Their Fourth Amendment Rights.

Petitioner asserts that in order for a violation of Penal Code § 148 and/or Vehicle Code § 2800 to have been committed, the actions which a citizen takes to obstruct or delay an officer cannot be constitutionally privileged. Otherwise, anyone who refuses to allow the police, upon

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[19] New Jersey v. T.L.O., 469 U.S. 709 (1987) involved searches of students by a school administrator, but this Court cautioned that the case did not address a search conducted by law enforcement.

request, to conduct a consensual search of their home, person, property or car could be arrested for obstructing or delaying an officer or refusing a lawful order.

In Lawson v. Kolender, 461 U.S. 352 (1983), this Court ruled that a California vagrancy statute requiring persons to provide reliable identification on request during Terry stops violated the Fourth Amendment.

In Brown v. Texas, 443 U.S. 47 (1979), this Court held that a statute requiring persons stopped by the police to identify themselves was unconstitutional as applied to a man who was stopped by officers who had no reasonable suspicion that the man was involved in a crime.

In Martinelli v. City of Beaumont, 820 F.2d 149 (9th Cir. 1987), a § 1983 action, the Ninth Circuit held that a failure to identify oneself to a police officer investigating hit and run accident cannot be punished under § 148 without violating the Fourth Amendment.

In Morgan v. Woessner, 975 F.2d 629 (9th Cir. 1992), the Ninth Circuit held that a plaintiff was entitled to judgment as a matter of law in a false arrest case when the evidence, according to the defendant' version of the facts, clearly indicated that the plaintiff did not want to be bothered by the officer. The officer insisted that the plaintiff was free to go and was not under arrest, but insisted that the plaintiff answer his question and demanded the plaintiff accompany him.

In People v. Wetzel, 11 Cal.3d 107 (1974), the California Supreme Court held that a defendant who stood in doorway of her apartment and refused to give consent to officers who requested permission to search for juvenile suspected of breaking window did not violate Penal Code § 148. The Court held that acts which constitute assertion of constitutional right cannot form the basis of criminal conduct. "Had she complied with the officers requests and stood back from the doorway this in itself would have, under the circumstances, constituted the consent which she

was not required to give."

See also People v. Quiroga 16 Cal.App.4th 961 (1993)(mere refusal to disclose personal information following an arrest for a misdemeanor or infraction cannot constitute resisting or delaying a peace officer.); United States v. Turner, 815 F.Supp. 1332 (N.D. Cal. 1993)(National Park Service Ranger noticed the defendant's car appeared to start moving as soon as the rangers vehicle came onto the scene. He yelled at the defendant to stop, but the defendant kept driving at a lawful rate of speed, rounded a building and met the officer's car coming the other way. Upon the officer's second command to stop, the defendant did, and the officer found evidence of criminal activity. The district court ruled that because the officer had no right to initially order the defendant to stop, he could not rely upon the defendant's failure to stop as grounds to justify the second stop. Accordingly, all the evidence was suppressed and the case dismissed.)

Most recently, this Court held in Illinois v. Wardlaw, ___ U.S. ___, 120 S.Ct. 673 (2000) that a person's unprovoked flight from a clearly identified police officer who was patrolling a high crime area could justify a temporary investigatory stop pursuant to the standards set forth in Terry v. Ohio, supra, 392 U.S. 1.

This Court stated:

> Such a holding is entirely consistent with our decision in Florida v. Royer, 460 U.S. 491 (1983), when we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. Id. at 498. And any "refusal to cooperate, without more, does not furnish the minimal level of objective

justification needed for a detention or seizure." Florida v. Bostick, 501 U.S. 429, 437 (1991).

In this instance, Petitioner was simply "going about her business" in loading her luggage into the trunk of her car, which was parked in a red zone. She had committed no crime, nor had she violated any traffic (as opposed to parking) or vehicle safety regulation. Her car was not contraband, did not contain any evidence, and was not subject to seizure under California Vehicle Code § 22651. (To the extent that Respondents may argue that it was subject to seizure, they did not present any evidence to support such a contention.[20])

As such, any actions taken by her which might be deemed delaying or obstructing the police, ignoring the police or refusing to cooperate could not constitutionally serve as the basis for a detention or arrest for a violation of Penal Code § 148 or Vehicle Code § 2800 without violating the Fourth Amendment.[21]

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[20] In fact, after she was arrested and transported from the scene, the police left it to her mother and coworkers to move the vehicle. RT I: 153; II: 167-168, 173; III: 94-95, 108.

[21] The only other actions articulated by Respondent LOPEZ at either the trial or his deposition was the tone of Petitioner's voice, telling Respondent LOPEZ he was wrong, protesting his actions or detention, or even yelling and screaming and cursing cannot constitute the basis for an arrest without violating the First Amendment. City of Houston v. Hill, 482 U.S. 451 (1987); Duran v. City of Douglas, 904 F.2d 1372 (9th Cir. 1990); MacKinney v.

In short, Petitioner's actions, under any construction and regardless of who is to be believed, was constitutionally privileged. Respondents did not contest the material facts leading to this conclusion. (A-17 through A-19, items nos. 3, 10, 11, 16, 18.) Any other facts are simply irrelevant to the inquiry.

Petitioner should therefore have been allowed to move her car without fear of any penalty. Her attempt to do so could not, as a matter of law, constitute obstructing or delaying an officer without violating the Fourth Amendment.

D. The Instant Case Involves an Important Federal Question That Has Not Been, but Should Be, Settled by this Court.

According to the California Department of Motor Vehicles there are some 20.7 million licensed drivers in the State of California. The County of San Diego alone has some 1.8 million licensed drivers in 1999. These drivers own some 17.9 million automobiles, 397.032 motorcycles, 5.7 million trucks, and 3 million trailers. see A-51 through A-56.

In accordance with California Vehicle Code

Nielsen, 69 F.3d 1002 (9th Cir. 1995)(all holding that the use of obscene gestures, and/or profanity and/or criticism directed toward a police officer is constitutionally protected lawful activity, and law enforcement officers may neither detain nor arrest a person who is engaged solely in such conduct.); People v. Robles, 48 Cal.App.4th Supp 1 (1996)("Penal Code § 148 does not apply solely to nonverbal conduct involving flight or forcible interference with an officer's activities") ; People v. Quiroga 16 Cal.App.4th 961 (1993)

40200.3(b), the City of San Diego has compiled information concerning the "number of cases processed and all sums received and distributed." (See Appendix A-57 through A-60)

The City of San Diego Parking Enforcement Bureau has reported that in fiscal year 1999 (July 1998 through July 1999) it issued 264,560 parking citations, and collected $10,924,226.37 in gross revenue and $10,835,058.05 in net revenue. It disbursed $2,756,716.56. (It is unknown if this disbursement was made to the Code Enforcement Civil Penalties Fund, as required by SDMC § 13.0402. Presumably, prior to their disbursement, the monies collected were deposited with the City Treasurer as required by Vehicle Code § 40200.4). It earned a surplus of $8,078,341.49, which was deemed "agency revenue."

After the City of San Diego Street Sweepers, the next largest revenue generator was the City of San Diego Police Department (not including the South Bay Division).[22] For fiscal year 1999 it issued 42,574 citations, and collected $2,289,271.25 in gross revenue and $2,264,345.25 in net revenue. It distributed $725,021.21 (It is also unknown if this disbursement was made to the Code Enforcement Civil Penalties Fund, as required by SDMC § 13.0402. Presumably, prior to their disbursement, the monies collected were also deposited with the City Treasurer as required by Vehicle Code § 40200.4.) It earned a surplus of $1,539,324.04, which was also deemed "agency revenue."

Under California Vehicle Code § 40202, each of these drivers is subject to arrest for violating California Penal Code § 148 if they should find themselves confronted by a

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[22] It should be noted that becasue the Police Department issues many types of citations, it cannot be determined how many were for non-criminal parking offenses.

police or parking enforcement officer desirous of issuing a citation which could be mailed to the registered owner of the vehicle.[23]

Given the sheer number of drivers and vehicle owners in the State of California and the enormous financial incentive for the CITY OF SAN DIEGO to issue parking citations, logic suggests that the consequences which befell Petitioner will repeat themselves[24] unless and until this

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[23] In the event the departure of the driver violates some other traffic law, such as speeding or reckless driving, Prouse would justify a warrantless detention.

[24] A parking enforcement officer is a "public officer" within the meaning of Penal Code § 148. Attempting to depart when a parking enforcement officer is attempting to gather information necessary to issue a parking citation is therefore punishable under Penal Code § 148.

Moreover, pursuant to the provisions of Penal Code § 836.5(d), "The governing body of a local agency, by ordinance, may authorize its officers and employees who have the duty to enforce a statute or ordinance to arrest persons for violations of the statute or ordinance as provided in subdivision (a)."

The City of San Diego has in fact done so, by enacting SDMC § 12.0105, which provides that:

"A director or any designated Enforcement Official is authorized to arrest without a warrant any person whenever the Enforcement Official has reasonable cause to believe that the person has committed a

Court declares such conduct unconstitutional.[25]

E. The Ruling of the Ninth Circuit Involves an Important Federal Question in a Way That Conflicts with Relevant Decisions of this Court.

In ths instance, the decision of the Court of Appeals failed to address the applicability of any of this Court's decisions on the detention and seizures of vehicles. Moreover, instead of requiring the State to justify its warrantless detention and seizure of Petitioner and her vehicle., (and consequent arrest of the Petitioner for attempting to exercise her Fourth Amendment rights), it

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violation of the Municipal Code or applicable state codes in his or her presence. Pursuant to Penal Code § 836.5 the Enforcement Official can only arrest a person by issuing a misdemeanor field citation."

Parking enforcement officers therefore can issue citations for violating Penal Code § 148.

[25] The current state of the law in the Ninth Circuit is that for purposes of a Fourth Amendment seizure, there is no constitutional difference between a custodial arrest and a notice to appear. Higbee v. City of San Diego, 911 F.2d 377 (9th Cir. 1990); Lopez v. City of Oxnard, 207 Cal.App.3d 1, 4 (1989)(an arrestee can not bring against policeman who should have issued notice to appear, but instead conducted full custodial arrest) but see Hewitt v. Helms, 459 U.S. 460, 472 (1983); Collins v. Jordan, 110 F.3d 1363, 1375-1376 (9th Cir. 1996)(use of mandatory statutory language creates actionable due process claim)

placed the burden on her to explain why her conduct was privileged, holding that she failed to do so.

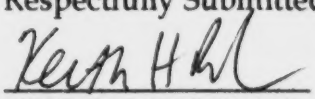
Such a decision requires the intervention of this Court.

F. Conclusion

For all of the foregoing reasons, ALMA ROMERO asks this Honorable Court to grant review in this case.

DATED: May 10, 2000

Respectfully Submitted,



KEITH H. RUTMAN
Attorney for Petitioner
ALMA ROMERO

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALMA ROMERO
Petitioner,

v.

JOSEPH LOPEZ AND THE CITY OF SAN DIEGO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

KEITH H. RUTMAN
Counsel of Record for Petitioner
2442 Fourth Avenue
San Diego, California 92101
Telephone: (619) 231-8872

63pp

APPENDIX

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--- F.3d ----
Unpublished Disposition

(Cite as: 2000 WL 158508 (9th Cir.(Cal.)))

Alma ROMERO, an individual, Plaintiff-Appellant,

v.

J.A. LOPEZ, an individual; City of San Diego, a political subdivision of the State of California; Does, 1-5, Defendants-Appellees.

No. 98-55897.
D.C. No. CV-97-00966-RMB.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 10, 1999.

Decided Feb. 14, 2000.

Appeal from the United States District Court for the Southern District of California, Rudi M. Brewster, District Judge, Presiding.

Before B. FLETCHER, KOZINSKI and THOMPSON, Circuit Judges.

MEMORANDUM [FN1]

FN1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Alma Romero appeals (1) the dismissal of her state law false

arrest claim; (2) the dismissal of her 42 U.S.C. § 1983 false arrest claim; (3) the denials of her motion for summary judgment and her motion for judgment as a matter of law; (4) the district court's refusal to instruct the jury on Cal. Penal Code § 853.6; and (5) various evidentiary rulings. Because the parties are familiar with the facts, we do not recite them here. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part and remand for further proceedings.

I.

Romero contends the district court erred when it sua sponte dismissed her state law false arrest claim under collateral estoppel principles. We agree.

We review the applicability of collateral estoppel de novo. See Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1114 (9th Cir.1999); Heath v. Cast, 813 F.2d 254, 258 (9th Cir.1987). We give a state court judgment the same preclusive effect it would be given under the law of the state in which it was rendered. See 28 U.S.C. § 1738; Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 80 (1984).

The California Supreme Court has explained that a guilty plea should not be given collateral estoppel effect. See Teitelbaum Furs, Inc. v. The Dominion Insurance Co., 58 Cal.2d 601, 605-06 (1962). Accordingly, the district court erred in dismissing Romero's state law false arrest claim. We reverse that dismissal and remand that claim to the district court. Because we affirm the district court in all other respects, the district court may, in its discretion, retain the state law false arrest claim or dismiss it without prejudice to filing it in state court. See 28 U.S.C. § 1367(c)(3).

Romero argues that if we reverse the dismissal of her state

law false arrest claim, we should also vacate the jury's verdict against her on her state law excessive force claim, because if the arrest was unlawful, the exertion of any force would have been unlawful. We decline to do so. If a jury were to find the arrest was lawful, that verdict would have no effect on the previous verdict against Romero on the excessive force claim. On the other hand, if a jury were to find that the arrest was unlawful, there would be no need to relitigate the legality of the use of force because all of Romero's damages would be recoverable as a result of the unlawful arrest.

II.

Romero also argues the district court erred when it held that her § 1983 false arrest claim was barred by Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, the Supreme Court explained:

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 487 (footnote omitted).

Applying Heck to this case, if a judgment for Romero on her § 1983 false arrest claim "would necessarily imply the invalidity of [her] conviction," id., Heck would bar Romero's § 1983 claim. See Cabrera v. City of Huntington Park, 159 F.3d 374, 380 (9th Cir.1998). To prevail on her § 1983 claim, Romero would have to demonstrate that there was no probable cause to arrest her. See id. However, Romero has already conceded the factual basis for her arrest by pleading guilty to disturbing the peace. See United States v. Broce, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence."); United States v. Kidder, 869 F.2d 1328, 1332-33 (9th Cir.1989) ("A guilty plea is an admission of each and every element required to establish the offense."). She has also admitted the legal sufficiency of her conviction. See id. In these circumstances, she cannot assert probable cause for her arrest was lacking, without "necessarily imply[ing]" that her conviction for disturbing the peace was invalid.

Romero attempts to avoid this result by arguing that the facts that underlay her guilty plea are distinguishable from those that make up her false arrest claim. She therefore contends that success on her § 1983 federal claim for false arrest would not "necessarily imply" the invalidity of her conviction. We disagree. Such a careful parsing is not possible given the facts of this case. Compare Smithart v. Towery, 79 F.3d 951, 952-53 (9th Cir.1996) (concluding that a plaintiff could state claim for excessive force, even though he was barred from stating a claim for false arrest given a prior Alford plea, because the facts that comprised the excessive force claim were easily severable from those relating to the arrest).

III.

Romero argues she was entitled to summary judgment on her state law false arrest claim because appellant Joseph Lopez had no authority to arrest her under California Penal Code § 148 after she attempted to take her car while he was trying to write the parking violation citation. The success of this argument depends on whether she had the right to flee the scene with her vehicle under California Vehicle Code § 40202. She has failed to establish such a "right." Section 40202 is silent on whether a driver has the right to take a vehicle while an officer is attempting to issue a citation involving it, and Romero offers no other authority authorizing the removal of a vehicle in this circumstance.

Romero alternatively argues she was entitled to summary judgment because she was illegally arrested for asserting her First Amendment rights. That assertion, however, was disputed. Lopez swore he arrested Romero, not for any First Amendment conduct, but for failing to comply with his lawful orders. This factual dispute precluded summary judgment. See Robi, 173 F.3d at 739.

Similarly, the district court properly denied Romero's motion for judgment as a matter of law. As with her motion for summary judgment, Romero has failed to show that her conduct was privileged. She has failed to identify any authority that creates a right to take a car while an officer is attempting to write a parking violation. Romero alternatively argues no reasonable jury could have concluded that she obstructed Lopez in the performance of his duties. However, Lopez testified he was unable to copy Romero's vehicle's information due to Romero's conduct. Although Romero asserts Lopez lied, the facts were in dispute and precluded entry of judgment as a matter of law. See Pierce v. Multnomah County, 76 F.3d 1032, 1037 (9th

Cir.1996).

IV.

Romero argues the district court erred by preventing her from arguing that a violation of Cal.Penal Code § 853.6 could serve as the basis for a § 1983 claim and a state law tort.

In the district court, Romero's counsel conceded that liability could not be based upon a violation of § 853.6. He stated that the evidence relating to an asserted violation of § 853.6 would be relevant only to show bias. Accordingly, Romero is precluded on appeal from asserting that a violation of California Penal Code § 853.6 provides a basis for liability.

V.

Finally, Romero contends the judgment should be vacated in light of various evidentiary errors. Specifically, Romero contends the district court abused its discretion when it excluded Lopez's personnel file and evidence relating to other alleged improper traffic stops involving Lopez. Romero further argues the district court erred when it precluded her from eliciting testimony from Alyce Gilliam as to the limitations on Gilliam's authority to detain drivers who attempt to flee while being issued traffic citations.

We review for abuse of discretion a district court's evidentiary rulings. See Gilbrook v. City of Westminster, 177 F.3d 839, 858 (9th Cir.), cert. denied sub nom., City of Westminster v. Herr, ____ U.S. ____, 120 S.Ct. 614, and cert. denied sub nom., Davis, Reno & Courtney v. City of Westminster, ____ U.S. ____, 120 S.Ct. 614 (1999); Evanow v. M/V NEPTUNE, 163 F.3d 1108, 1113 (9th Cir.1998). However, to reverse on the basis of an erroneous

evidentiary ruling, we must also conclude that the error was prejudicial. Gilbrook, 177 F.3d at 858. Reversal of a jury verdict is not warranted unless the evidentiary error affected a party's substantial rights. Id.

The district court did not abuse its discretion when it excluded Lopez's personnel file under Rule 403 of the Federal Rules of Evidence. Romero sought to impeach Lopez with his alleged prior admission that he was "structured." However, as the district court observed, the term "structured" is very vague. Its probative value was minimal and its potential for misleading the jury was substantial.

Nor did the district court abuse its discretion when it excluded the "other acts" evidence. Had the evidence been admitted, the jury might have given it undue weight and been confused by it. Admitting the evidence also would have lengthened and complicated the trial because the parties would have had to litigate the circumstances of each prior traffic stop.

Finally, the district court did not err when it prevented Romero from eliciting testimony from Gilliam on police practices. Gilliam was not designated as an expert witness. See Fed.R.Civ.P. 37(c). More fundamentally, Romero was not prejudiced by the exclusion of the evidence. Gilliam's proffered testimony would not have helped Romero, because it would not have supported an inference that Lopez could not have detained Romero. Romero, therefore, has failed to show prejudice from the alleged error.

CONCLUSION

The judgment is AFFIRMED in part, REVERSED in part and REMANDED. Each side shall bear its own costs and fees.

Because we affirm the district court's dismissal of the federal claims, the district court may exercise its discretion whether to retain Romero's state law false arrest claim, or dismiss it without prejudice to filing it in state court. See 28 U.S.C. § 1367(c)(3).

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[FILE STAMP DATED FEB 4, 1998]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALMA ROMERO, an individual, Plaintiff, vs. JOSEPH LOPEZ, an individual, and CITY OF SAN DIEGO a political subdivision of the State of California and DOES 1-5, Defendants.	Case No. 97-CV-0966-B ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On November 24,1997, Plaintiff moved for summary judgment on three of her four causes of action. On December 8, 1997, Defendants filed their opposition to the motion. On December 12,1997, Plaintiff filed her reply. Upon due consideration of the moving and responding papers and for the reasons set forth below, the Court DENIES Plaintiffs motion for summary judgment.

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1. Background

Alma Romero ("Plaintiff") was arrested in the midst of receiving a parking citation. She has sued San Diego Police Officer Joseph Lopez ("Lopez") and the City of San Diego for two federal § 1983 claims (violation of her 4th Amendment rights for false arrest and excessive use of force), and two state law claims (intentional infliction of emotional distress and "false arrest/false imprisonment/excessive force"). This Court has federal question jurisdiction over the 1983 claims under 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. §1367. Plaintiff has moved for partial summary judgment on three of the claims, false arrest under § 1983, "false arrest/false imprisonment/excessive force", and emotional distress.

A. Undisputed Facts

Plaintiff parked on December 3, 1996 in a red 'no parking" zone on the street adjacent to the Westin Hotel in Horton Plaza, where she was employed. Plaintiff had just returned from a trip to Brazil. The taxi from the airport dropped her and her mother next to the Westin Hotel, leaving her luggage on the curb. Plaintiff retrieved her car from the Westin's parking garage, parked in the red zone, and began to load her luggage into her car. A series of disputed events then followed, detailed below. After these events, Plaintiff was arrested for violating California Penal Code § 148 (delaying/resisting/obstructing an officer). She pled guilty to a violation of Penal Code §415 (disturbing the peace) in a plea bargain.

2. Disputed Facts

The parties relate very different versions of their confrontation. Both parties have taken depositions under oath and both sides cite to the transcripts in their moving and responding papers. Plaintiff alleges that she was loading her luggage into her car when Officer Lopez arrived

and began angrily shouting at her that she was illegally parked and must move immediately. Plaintiff alleges that she attempted to comply but was unable to move her car because the path was blocked by another car. She claims that she heard no further instructions from Lopez until he suddenly opened her car door and forcefully removed her from the vehicle. Plaintiff claims that Officer Lopez used excessive force, causing bruising on her arms. Plaintiff claims that she was only trying to comply with Lopez's command to move the car, and resisted being pulled from the car because she was confused and did not know what was happening. Plaintiff claims she dealt with Officer Lopez politely and never shouted, and that she never heard any instructions from Lopez to leave the car where it was, or to exit the car, or the reason for her arrest, Plaintiff claims that she was treated rudely on the way to jail and humiliated by police taunts and a frisk.

Officer Lopez alleges a different version of the incident. He asserts that he saw Plaintiff's car Illegally parked arid approached to inform her. Lopez alleges Plaintiff angrily replied that she was too tired from a long trip to "have time for this." From that response, Lopez concluded that Plaintiff was not going to move her car and decided to issue a parking ticket. As he prepared to write the ticket, he observed Plaintiff cease loading her luggage and get into the driver's seat. Lopez claims that he informed Plaintiff that she could not move the car until he had finished writing the ticket, but that Plaintiff ignored him and began to back up the car. Lopez claims that he jogged up to the car and told Plaintiff to step out of the car, but Plaintiff replied, "I'm leaving" and refused to get out. Lopez concluded that Plaintiff was not complying with his instructions arid was trying to leave the scene to evade the parking ticket. Lopez opened the car door and reached over to switch off the ignition. Lopez alleges that he tried to pull Plaintiff from the car, but she resisted, while "screaming like

a maniac." After a scuffle, Lopez says that he removed Plaintiff from the car, handcuffed her, and placed her in the backup squad car when it arrived. Defendants have not addressed the events on the way to the jail or in jail because they interpret Plaintiffs motion for summary judgment as "based solely on the allegation that she was falsely arrested."

There were several witnesses to the incident. San Diego Parking Officer Alyce Gilliam observed the arrest from the point at which Plaintiff was pulled from her car. Her recollection supports Officer Lopez. Gilliam, who assisted Lopez in arresting Plaintiff, declares that Plaintiff was out of control and yelling. Diane Mucha works in the Post Office, which is adjacent to the scene of the arrest. Her deposition also appears to support Lopez. Mucha says she heard Lopez command Plaintiff to exit the car, and that Lopez informed Plaintiff that she was under arrest. Mucha says that Plaintiff replied by yelling 'I'm trying to move the car, I'm leaving."

II. Discussion

1. Standard of Law

On a motion for summary judgment, the moving party must establish that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rule of Civil Procedure 56(c) (emphasis added). See also British Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978). A moving party who bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c), Celotex Corp. y. Catrett, 477 U.S. 317, 324 (1986).

In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) To withstand a motion for summary judgment, the non-moving party must show that

there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

2. Plaintiff's Claims

Plaintiff alleges four causes of action against the Defendants, and has moved for summary judgment on three of them.

1. False arrest under §1983

Plaintiff alleges that Defendants violated her 4th Amendment constitutional rights by arresting her without probable cause. She alleges that a reasonably prudent officer would have known that she was not subject to arrest for her actions. Plaintiff was arrested initially for delaying/resisting/obstructing an officer, Cal. Penal Code § 148, and later pled guilty to breach of the peace. Penal Code §415.

Under California law, parking tickets are civil penalties, not crimes. Cal. Vehicle Code §40200(a). If a ticketed vehicle is driven away before a ticket is attached to it, the city processes the ticket through the mail. Vehicle Code §40202(d). The ticketing officer is required to record the license plate, make and color of die car, and the Vehicle Identification Number if visible. Vehicle Code § 40202(a). Lopez alleges he had not collected that information when Plaintiff began to move her car. He claims that he commanded Plaintiff not to move the car. Under Vehicle Code § 2800, it is unlawful to refuse to comply with lawful order . . . of any police officer . . performing (their) duties." Under Penal Code § 148(a) "every person who wilfully resists, delays or obstructs any public officer . . . in the discharge or attempt to discharge any duty . . . is punishable."

As discussed above, in considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the non-moving

party. Lopez alleges that Plaintiff heard his command to stop the car and exit the vehicle, that she acknowledged him, and that she refused to comply. Lopez also alleges that she physically resisted his subsequent arrest. Depositions of other witnesses also support his version of the facts.

Viewing the facts in the light most favorable to the Defendants, there was probable cause to arrest Plaintiff under California Penal Code § 148. Therefore, facts are still in dispute and Plaintiff's § 1983 claim for false arrest does not warrant summary judgment.

2. **False arrest/False Imprisonment/Excessive force**

Plaintiff has sued for "False arrest/False Imprisonment/Excessive force" without reference to any law. The Court has investigated relevant California statutes and case law.

Plaintiff has sued for false arrest false Imprisonment. Section 146 of the California Penal Code forbids officers from arresting persons "under the pretense or color of any process, (without) . . . lawful authority." Arrests are permitted whenever an officer has reasonable cause to believe that a person has committed a "public offense" in their presence. Cal. Penal Code § 836; Agar v. Superior Court, 21 Cal.App.3d 24 (1971). Public offenses include felonies, misdemeanors, and infractions. People v. Tennessee, 4 Cal.App.3d 788 (1970). Immunity for false arrest and false imprisonment is granted to officers if they make a lawful arrest within the scope of their authority, or if the officer had reasonable cause to believe that the arrest was lawful. Cal. Penal Code § 847.

"Reasonable cause" is tested on the established facts. Construing the facts in favor of the nonmoving party, issues of material fact exist as to whether, when Plaintiff did not exit the vehicle as commanded, thereby violating Vehicle Code §2800, Lopez had the right to arrest Plaintiff under Cal. Penal Code §836.

Plaintiff alleges a state law claim of excessive force.

Cal. Penal Code §835a grants arresting officers the right to use "reasonable force" to effect an arrest. What constitutes reasonable force is normally a question of fact. People v. Howell, 30 Cal. App. 3d 228 (1973); People y. Tyler, 193 Cal.App.2d 728 (1961). Material questions of fact remain as to the nature and extent of the force used by Officer Lopez. Therefore, Plaintiff is not entitled to summary judgment.

3. Intentional infliction of emotional distress

Plaintiff alleges under state law that her arrest was done maliciously and with the purpose of causing emotional distress. Under California law, the elements of a cause of action for intentional infliction of emotional distress are (1) outrageous conduct, (2) an intention to cause or reckless disregard of the probability of causing emotional distress, (3) plaintiff's severe emotional suffering, and (4) actual and proximate causation of that suffering. Molko v. Holy Spirt Assn., 46 Cal. 3d 1092, 1120 (1989). Plaintiff has identified no conduct by defendants which would rise to the level of "outrageous" behavior required to establish a claim of intentional infliction of emotional distress. Angie M. v. Superior Court of San Diego County, 37 Cal. App.4th 1217 (1995). For conduct to meet this standard, it must be so "extreme as to exceed all bounds of that usually tolerated in a civilized society." Fowler v. Varian Assoc., Inc., 196 Cal. App. 3d 34, 44 (1987). "On the spectrum of offensive conduct outrageous conduct is that which is the most extremely offensive. Depending on the idiosyncracies of the plaintiff, offensive conduct which falls along the remainder of the spectrum may be irritating, insulting or even distressing, but it is not actionable and must simply be endured without resort to legal redress." Yurick v. Superior Court, 209 Cal.App.3d 1116, 1129 (1989). The Court must determine, in the first instance, whether the defendant's conduct is so extreme and outrageous as to permit recovery, Fowler, 196 Cal, App. 3d at 44.

Plaintiff has not demonstrated outrageous conduct

as a matter of law. Even if, as Plaintiff alleged, Lopez was physical in his arrest, Plaintiff has not established that she is entitled to judgment as a matter of law. Being arrested and booked into jail is certainly a harrowing process, but Plaintiff has pled guilty to a crime in this incident. To allege being "treated like a common criminal., even though [she] was well-dressed" does not establish outrageous conduct as a matter of law.

Accepting the facts in a light most favorable to the Defendants, the unproven allegations of emotional distress do not warrant summary judgment.

III. Conclusion

For the reasons set forth above, the Court DENIES Plaintiff's"s Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: FEB 04 1998

/S
RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

cc: All Parties
Magistrate Judge

KEITH H. RUTMAN, Bar #144175
Attorney at Law
2442 Fourth Avenue
San Diego, California 92101-1609
Telephone: (619) 231-8872
Facsimile: (619) 232-6052

Attorney for Plaintiff
ALMA ROMERO

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA
(Hon. Rudi M. Brewster)

ALMA ROMERO, an individual, Plaintiff, vs. JOSEPH LOPEZ, an individual, and CITY OF SAN DIEGO a political subdivision of the State of California and DOES 1-5, Defendants.	Case No. 97-CV-0966-B SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS DATE: 12-22-97 @ 10:30 PTC: 2-9-98 @ 10:30 JURY TRIAL: 2-24-98 @ 9:00 COURTROOM: 2

COMES NOW Plaintiff, by and through her attorney, KEITH H. RUTMAN, and hereby submits her Separate Statement of Undisputed Material Facts with the

Court, in support of her Motion for Summary Judgment.

ISSUE A: A PERSON BEING ISSUED A PARKING CITATION, WHICH IS NOT A CRIMINAL OFFENSE, IS FREE TO LEAVE AND ATTEMPTING TO LEAVE CANNOT BE CONSIDERED A VIOLATION OF PENAL CODE § 148 (DELAYING AN OFFICER).

	MATERIAL FACTS	SUPPORTING EVIDENCE
1	On December 3, 1996, Plaintiff and her mother returned to San Diego from a trip to Brazil. Plaintiff, a sales manager then employed by the Westin Hotel (formerly the Doubletree) located at 910 Broadway Circle, had parked her car in the Westin's garage and she	1. Hurst Depo at 9:12-23, 17:22-24, 24-25:24-11; Mucha Depo at 18:10-14, 25:10-16, LOPEZ Depo at 40:13-15; Plaintiff's Response to Defendants' Special Interrogatory Number 14.

	and her mother took a taxi to and from the airport.	
2.	Once the taxi dropped them off in front of the U.S. Post Office located next to the hotel, she left her mother and a large amount of luggage on the sidewalk. She retrieved her car, parking it (with the keys in the ignition) in the exact same spot where the taxi had pulled over to drop them off. She opened the trunk, got out of the car and began loading the luggage into the trunk.	2. Plaintiff's Response to Defendants' Special Interrogatory Number 14, ROMERO Depo at 68-75.
3.	Ms. ROMERO's car was parked in a red "no parking" zone.	3. Gilliam Depo at 19-20:8-4; LOPEZ Depo 39-40.
4.	Defendant LOPEZ parked his motorcycle in front of her car, and	4. Mucha Depo at 32:8-12; Gilliam Depo at 48:4-7;

	immediately began yelling at Plaintiff that she was parked in a red zone. Plaintiff apologized and said that she would finish packing her car and move the car. Defendant LOPEZ stated "that's too bad, its going to cost you $60.00. MOVE IT!!!" Plaintiff then ceased loading the luggage (she was about halfway done) and, after telling her mother that she was going to move the car, attempted to move it as directed. Specifically, she wanted to back up into the hotel traffic circle, which is a passenger loading zone.	LOPEZ Depo at 39-40:21-15; ROMERO Depo at 91-93.
5.	While backing up her car, she drove over an item of her luggage because	5. Boyd Depo at 9:8-10, 23:9-23, 28-29:22-3; Mucha Depo at 36:4-10; Gilliam Depo at 48:8-10, 61:7-8.

	she was in a hurry to comply with his order.	
6.	She had difficulty backing up because a white vehicle was blocking her path. This vehicle was driven by Detective Boyd.	6. Boyd Depo at 8-9, 18, 23; ROMERO Depo at 78-81.
7.	LOPEZ pulled her from her car and arrested her for a violation of Penal Code § 148, delaying an officer.	7. Hurst Depo at 23-24:23-123, 26:8-13; Mucha Depo at 52:16-19; Arrest Report.
8.	Ms. ROMERO had committed no other offenses which would subject her to arrest.	8. Defendants' Response to Plaintiff's Special Interrogatory Number 3.
9.	An officer issuing a parking citation need not obtain a VIN number or expiration date in every instance.	9.Gilliam Depo at 28-29:14-21, 31-32:23-7, 33-38:2-12;
10.	Ms. ROMERO, like any other citizen,	10. Gilliam Depo at 39-40:24-12, 42-43:12-25.

	has the right to leave while a parking citation is being issued.	
11.	The information LOPEZ was required to obtain by the Municipal/Vehicle Codes was visible, i.e., not obstructed from view.	11. LOPEZ Depo at 53-54, 64.

ISSUE B: EVEN IF PLAINTIFF COULD BE DETAINED IN ORDER TO BE ISSUED A CITATION, SHE COULD NOT BE SUBJECTED TO A CUSTODIAL ARREST.

MATERIAL FACTS		SUPPORTING EVIDENCE
12.	Ms. ROMERO was handcuffed by LOPEZ, who subjected her to a full custodial arrest.	12. LOPEZ Depo at 72-73.
13.	LOPEZ did not attempt to cite and release Ms. ROMERO in accordance with	13. LOPEZ Depo at 49-53.

	Penal Code § 853.6.	
14.	The seven factors listed in Penal Code 853.6(l) did not apply to Ms. ROMERO's situation.	14. LOPEZ Depo at 49-53.
15.	LOPEZ never asked Ms. ROMERO for identification.	15. LOPEZ Depo at 83:3-11, ROMERO Depo at 87-89.

Respectfully Submitted,

Dated: November 22, 1997

/S
KEITH H. RUTMAN
Attorney for Plaintiff
ALMA ROMERO

CASEY GWINN, City Attorney
ANITA M. NOONE, Assistant City Attorney
ANTHONY KIDD, Deputy
California State Bar No. 167890
Office of the City Attorney
Civil Division
1200 Third Avenue, Suite 1100
Telephone: (619) 533-5800
Facsimile: (619) 533-5856; 533-5847

Attorneys for Defendants
City of San Diego and J.A. Lopez

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALMA ROMERO, an individual, Plaintiff, vs. JOSEPH LOPEZ, an individual, and CITY OF SAN DIEGO a political subdivision of the State of California and DOES 1-5, Defendants.	Case No. 97-CV-0966-B STATEMENT OF GENUINE ISSUES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT DATE: 12-22-97 TIME: 10:30 a.m. COURTROOM: 2

Defendants' Joseph Lopez and the City of San Diego submit this statement of genuine issues in opposition to the motion for summary judgment herein filed by Plaintiff Alma Romero.

Facts 1 through 15 below correspond to the facts and supporting evidence presented in the Statement of Undisputed Materia facts filed by the moving party. These facts are followed by additional material facts and supporting evidence showing a genuine issue.

MOVING PARTY'S ALLEGED UNDISPUTED MATERIAL FACTS	RESPONSE IN OPPOSITION
1. On December 3, 1996, Plaintiff and her mother returned to San Diego from a trip to Brazil. Plaintiff, a sales manager then employed by the Westin Hotel (formerly the Doubletree) located at 910 Broadway Circle, had parked her car in the Westin's garage and she and her mother took a taxi to and from the airport.	1. Defendants' agree this is undisputed.
2. Once the taxi	2. Defendants' agree this

	dropped them off in front of the U.S. Post Office located next to the hotel, she left her mother and a large amount of luggage on the sidewalk. She retrieved her car, parking it (with the keys in the ignition) in the exact same spot where the taxi had pulled over to drop them off. She opened the trunk, got out of the car and began loading the luggage into the trunk.	is undisputed.
3.	Ms. ROMERO's car was parked in a red "no parking" zone.	3. Defendants' agree this is undisputed.
4.	Defendant LOPEZ parked his motorcycle in front of her car, and immediately began yelling at Plaintiff that she was parked in a red zone. Plaintiff	4. Defendants' deny this is undisputed. See Deposition of Joseph Lopez, page 62, lines 11-25; page 64, lines 11-21; page 66 lines 15-25 Exhibit (Ex.) A; See also Deposition of Diane Mucha page 24, lines 1-13;

	apologized and said that she would finish packing her car and move the car. Defendant LOPEZ stated "that's too bad, its going to cost you $60.00. MOVE IT!!!" Plaintiff then ceased loading the luggage (she was about halfway done) and, after telling her mother that she was going to move the car, attempted to move it as directed. Specifically, she wanted to back up into the hotel traffic circle, which is a passenger loading zone.	lines 1-13; page 26 lines 8-13, Ex. D; See also Deposition James Boyd, page 11, lines 13-22; page 24, lines 3-20; page 25, lines 6-16, Ex. E.
5.	While backing up her car, she drove over an item of her luggage because she was in a hurry to comply with his order.	5. Defendants' deny this is undisputed. See Deposition of Joseph Lopez, page 64, lines 11-21; page 66 lines 15-25, Ex. A; See also Deposition of Diane Mucha page 24, lines 1-13; page 26 lines 8-13, Ex. D; also Deposition

		James Boyd, page 11, lines 13-22; page 24, lines 3-20; Ex. E.
6.	She had difficulty backing up because a white vehicle was blocking her path. This vehicle was driven by Detective Boyd.	6. Defendants' agree this is undisputed.
7.	LOPEZ pulled her from her car and arrested her for a violation of Penal Code § 148, delaying an officer.	7. Defendants agree that Plaintiff was arrested for a violation of Penal Code § 148 (Ex. I), which prohibits resisting, delaying or obstructing an officer in the discharge of any duty of his office.
8.	Ms. ROMERO had committed no other offenses which would subject her to arrest.	8. Defendants' deny this is undisputed. See California Vehicle Code § 2800, Ex. F; See also Deposition of Joseph Lopez, page 64, lines 11-21; page 66 lines 15-25, Ex. A; See also Deposition of Diane Mucha page 24, lines 1-13; Ex. D.
9.	An officer issuing a parking citation need not obtain a	9. Defendants' deny this is undisputed. See Deposition of Joseph

	VIN number or expiration date in every instance.	Lopez, page 65, lines 5-16; page 60 lines 18-21, Ex. A; See also Deposition of Alyce Gilliam, page 32, lines 2-7, C; See also California Vehicle Code § 40202(a), Ex. H.
10.	Ms. ROMERO, like any other citizen, has the right to leave while a parking citation is being issued.	10. Defendants' agree this is undisputed.
11.	The information LOPEZ was required to obtain by the Municipal/Vehicle Codes was visible, i.e., not obstructed from view.	11. Defendants' agree this is undisputed.
12.	Ms. ROMERO was handcuffed by LOPEZ, who subjected her to a full custodial arrest.	12. Defendants' agree this is undisputed.
13.	LOPEZ did not attempt to cite and release Ms. ROMERO in accordance with	13. Defendants' agree this is undisputed.

	Penal Code § 853.6.	
14.	The seven factors listed in Penal Code 853.6(l) did not apply to Ms. ROMERO's situation.	14. Defendants' deny this is undisputed. See Deposition of Joseph Lopez, page 66 lines 15-17; page 67, lines 4-18; page 69, lines 2-14; page 70, lines 2-25; page 71, lines 9-14, Ex. A; See also Deposition of Alma Romero page 85, lines 14-24, Ex. B; See also Deposition of Alyce Gilliam, page 53, lines 10-18; page 66, lines 6-24; page 67, lines 17-20, Ex. C; See also Deposition of Diane Mucha page 24, lines 1-13; page 29 lines 13-15; page 43, lines 18-19; page 44, lines 5-19, Ex. D; See also Deposition of James Boyd, page 11, lines 16-20; page 24, lines 3-20; page 25, lines 6-16, Ex. E.
15.	LOPEZ never asked Ms. ROMERO for identification.	15. Defendants' agree this is undisputed.

ADDITIONAL MATERIAL FACTS		SUPPORTING EVIDENCE
16.	Lopez attempted to issue a parking citation to the car Ms. Romero was in control of after MS. Romero failed to move the car as requested by Lopez. Ms. Romero was not free to take the car until Lopez had gathered the information necessary to issue the car a citation.	16. See Deposition of Joseph Lopez, page 53, lines 16-25; page 54, lines 1-5; page 62, lines 11-16; page 65, lines 5-16; page 66, lines 15-17, Ex. A; See also Deposition of Alma Romero page 77, lines 12-17, Ex. B.
17.	Lopez instructed Ms. Romero not to move the car because he had not been able to write down any of the car's identifying information necessary for the issuance of the citation.	17. See Deposition of Joseph Lopez, page 65 lines 5-16, Ex. A, also Deposition of Alma Romero page 91, lines 23-28, Ex. B.
18.	Ms. Romero ignored Lopez's orders not to move the car, entered the	18. See Deposition of Joseph Lopez, page 66 lines 15-25; page 67, lines 1-13; page 69, lines 2-14;

car and began to back away from Lopez. Ms. Romero also ordered Lopez's order to stop and exit the car. Therefore, Lopez was forced to pull Ms. Romero from the car over her resistance and place her under custodial arrest. It was clear that Ms. Romero was not going to comply with Lopez's orders and the offense was going to continue. Therefore, she was not given a misdemeanor citation and released.

page 70, lines 2-25; page 71, lines 18-20, Ex. A; See also Deposition of Alma Romero page 86, lines 8-19; page 87, lines 12-13, Ex. B; See also Deposition of Alyce Gilliam, page 53, lines 10-18; page 66, lines 6-25; page 67, lines 1-20, Ex. C; See also Deposition of Diane Mucha page 24, lines 1-13; page 26 lines 8-22; page 44, lines 5-19, Ex. D; See also Deposition of James Boyd, page 25, lines 6-16, Ex. E.

Respectfully Submitted,

Dated: December 8, 1997

CASEY GWINN, City Attorney
By Anthony Kidd /S
Deputy City Attorney
Attorneys for Defendants
City of San Diego
and Joseph Lopez

California Penal Code § 148

(a)(1) Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

California Penal Code § 836

(a) A peace officer may arrest a person in obedience to a warrant, or, pursuant to the authority granted to him or her by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, without a warrant, may arrest a person whenever any of the following circumstances occur:

(1) The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence.

California Penal Code § 836.5

(a) A public officer or employee, when authorized by ordinance, may arrest a person without a warrant whenever the officer or employee has reasonable cause to believe that the person to be arrested has committed a misdemeanor in the presence of the officer or employee that is a violation of a statute or ordinance that the officer or employee has the duty to enforce.

(b) There shall be no civil liability on the part of, and no cause of action shall arise against, any public officer or employee acting pursuant to subdivision (a) and within the scope of his or her authority for false arrest or false imprisonment arising out of any arrest that is lawful or that the public officer or employee, at the time of the arrest, had reasonable cause to believe was lawful. No officer or employee shall be deemed an aggressor or lose his or her right to self-defense by the use of reasonable force to effect the arrest, prevent escape, or overcome resistance.

California Vehicle Code § 2800

(a) It is unlawful to willfully fail or refuse to comply with any lawful order, signal, or direction of any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, when that peace officer is in uniform and is performing duties under any of the provisions of this code, or to refuse to submit to any lawful inspection under this code.

California Vehicle Code § 22651

Any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code; or any regularly employed and salaried employee, who is engaged in directing traffic or enforcing parking laws and regulations, of a city, county, or jurisdiction of a state agency in which a vehicle is located, may remove a vehicle located within the territorial limits in which the officer or employee may act, under any of the following circumstances:

(a) When any vehicle is left unattended upon any bridge, viaduct, or causeway or in any tube or tunnel where the vehicle constitutes an obstruction to traffic.

(b) When any vehicle is parked or left standing upon a highway in a position so as to obstruct the normal movement of traffic or in a condition so as to create a hazard to other traffic upon the highway.

(c) When any vehicle is found upon a highway or any public lands and a report has previously been made that the vehicle has been stolen or a complaint has been filed and a warrant thereon issued charging that the vehicle has been embezzled.

(d) When any vehicle is illegally parked so as to block the entrance to a private driveway and it is impractical to move the vehicle from in front of the driveway to another point on the highway.

(e) When any vehicle is illegally parked so as to prevent access by firefighting equipment to a fire hydrant and it is impracticable to move the vehicle from in front of the fire hydrant to another point on the highway.

(f) When any vehicle, except any highway maintenance or construction equipment, is stopped, parked, or left standing for more than four hours upon the right-of-way of any freeway which has full control of access and no crossings at grade and the driver, if present, cannot move the vehicle under its own power.

(g) When the person or persons in charge of a vehicle upon a highway or any public lands are, by reason of physical injuries or illness, incapacitated to an extent so as to be unable to provide for its custody or removal.

(h)(1) When an officer arrests any person driving or in control of a vehicle for an alleged offense and the officer is, by this code or other law, required or permitted to take, and does take, the person into custody. . . .

(i)(1) When any vehicle, other than a rented vehicle, is found upon a highway or any public lands, or is removed pursuant to this code, and it is known that the vehicle has been issued five or more notices of parking violations to which the owner or person in control of the vehicle has not responded . . .

(j) When any vehicle is found illegally parked and there are no license plates or other evidence of registration displayed, the vehicle may be impounded until the owner or person in control of the vehicle furnishes the impounding law enforcement agency evidence of his or her identity and an address within this state at which he or she can be located.

(k) When any vehicle is parked or left standing upon a highway for 72 or more consecutive hours in violation of a local ordinance authorizing removal.

(l) When any vehicle is illegally parked on a highway in violation of any local ordinance forbidding standing or parking and the use of a highway, or a portion thereof, is necessary for the cleaning, repair, or construction of the highway, or for the installation of underground utilities, and signs giving notice that the vehicle may be removed are erected or placed at least 24 hours prior to the removal by local authorities pursuant to the ordinance.

(m) Wherever the use of the highway, or any portion thereof, is authorized by local authorities for a purpose other than the normal flow of traffic or for the movement of equipment, articles, or structures of unusual size, and the parking of any vehicle would prohibit or interfere with that use or movement, and signs giving notice that the vehicle may be removed are erected or placed at least 24 hours prior to the removal by local authorities pursuant to the ordinance.

(n) Whenever any vehicle is parked or left standing where local authorities, by resolution or ordinance, have prohibited parking and have authorized the removal of vehicles. No vehicle may be removed unless signs are posted giving notice of the removal.

(o)(1) When any vehicle is found upon a highway, any public lands, or an offstreet parking facility with a registration expiration date in excess of six months before the date it is found on the highway, public lands, or the offstreet parking facility. However, if the vehicle is occupied, only a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, may remove the vehicle. . . .

(p) When the peace officer issues the driver of a vehicle a notice to appear for a violation of Section 12500, 14601, 14601.1, 14601.2, 14601.3, 14601.4, 14601.5, or 14604 and the vehicle has not been impounded pursuant to Section 22655.5. Any vehicle so removed from the highway or any public lands, or from private property after having been on a highway or public lands, shall not be released to the registered owner or his or her agent, except upon presentation of the registered owner's or his or her agent's currently valid driver's license to operate the vehicle and proof of current vehicle registration, or upon order of a court.

(q) Whenever any vehicle is parked for more than 24 hours on a portion of highway which is located within the boundaries of a common interest development, as defined in subdivision (c) of Section 1351 of the Civil Code, and signs, as required by Section 22658.2, have been posted on that portion of highway providing notice to drivers that vehicles parked thereon for more than 24 hours will be removed at the owner's expense, pursuant to a resolution or ordinance adopted by the local authority.

(r) When any vehicle is illegally parked and blocks the movement of a legally parked vehicle.

California Vehicle Code § 22651 (continued)

(s)(1) When any vehicle, except highway maintenance or construction equipment, an authorized emergency vehicle, or a vehicle which is properly permitted or otherwise authorized by the Department of Transportation, is stopped, parked, or left standing for more than eight hours within a roadside rest area or viewpoint. . .

(t) When a peace officer issues a notice to appear for a violation of Section 25279.

California Vehicle Code § 40200

(a) Any violation of any regulation that is not a misdemeanor governing the standing or parking of a vehicle under this code, under any federal statute or regulation, or under any ordinance enacted by local authorities is subject to a civil penalty. The enforcement of those civil penalties shall be governed by the civil administrative procedures set forth in this article.

(b) Except as provided in Section 40209, the registered owner and driver, rentee, or lessee of a vehicle cited for any violation of any regulation governing the parking of a vehicle under this code, under any federal statute or regulation, or under any ordinance enacted by a local authority shall be jointly liable for parking penalties imposed under this article, unless the owner can show that the vehicle was used without consent of that person, express or implied. An owner who pays any parking penalty, civil judgment, costs, or administrative fees pursuant to this article shall have the right to recover the same from the driver, rentee, or lessee.

(c) The driver of a vehicle who is not the owner thereof but who uses or operates the vehicle with the express or implied permission of the owner shall be considered the agent of the owner to receive notices of parking violations served in accordance with this article and may contest the notice of violation.

California Vehicle Code § 40200.3

(a) All parking penalties collected by the processing agency, which may be the issuing agency, including process service fees and fees and collection costs related to civil debt collection, shall be deposited to the account of the issuing agency, except that those sums attributable to the issuance of a notice of parking violation by a peace officer of the Department of the California Highway Patrol shall be deposited in the account in the jurisdiction where the violation occurred, and except those sums payable to a county pursuant to Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code and that portion of any parking penalty which is attributable to an increase in the parking bail amount effective between September 16, 1988, and July 1, 1992, inclusive, pursuant to Section 1463.28 of the Penal Code. Those funds attributable to this increase in bail shall be transferred to the county treasurer and deposited in the general fund. Any increase in parking penalties effective after July 1, 1992, shall accrue to the benefit of the issuing agency.

(b) The processing agency shall prepare a report at the end of each fiscal year setting forth the number of cases processed, and all sums received and distributed, together with any other information that may be required by the issuing agency or the Controller. This report is a public record and shall be delivered to each issuing agency. Copies shall be made available, upon request, to the county auditor, the Controller, and the grand jury.

California Vehicle Code § 40200.4

(a) The processing agency shall deposit with the county treasurer all sums due the county as the result of processing a parking violation not later than 45 calendar days after

(f) As used in this article, "parking penalty" includes the fine authorized by law, including assessments authorized by this article, any late payment penalty, and costs of collection as provided by law.

(a) If a vehicle is unattended during the time of the violation, the peace officer or person authorized to enforce parking laws and regulations shall securely attach to the vehicle a notice of parking violation setting forth the violation, including reference to the section of this code or of the Public Resources Code, the local ordinance, or the federal statute or regulation so violated; the date; the approximate time thereof; the location where the violation occurred; a statement printed on the notice indicating that the date of payment is required to be made not later than 21 calendar days from the date of citation issuance; and the procedure for the registered owner, lessee, or rentee to deposit the parking penalty or, pursuant to Section 40215, contest the citation. The notice of parking violation shall also set forth the vehicle license number and registration expiration date if they are visible, the last four digits of the vehicle identification number, if that number is readable through the windshield, the color of the vehicle, and, if possible, the make of the vehicle. The notice of parking violation, or copy thereof, shall be considered a record kept in the ordinary course of business of the issuing agency and the processing agency and shall be prima facie evidence of the facts contained therein.

(b) The notice of parking violation shall be served by attaching it to the vehicle either under the windshield wiper or in another conspicuous place upon the vehicle so as to be easily observed by the person in charge of the vehicle upon the return of that person.

(c) Once the issuing officer has prepared the notice of parking violation and has attached it to the vehicle as provided in subdivisions (a) and (b), the officer shall file the notice with the processing agency. Any person, including

the issuing officer and any member of the officer's department or agency, or any peace officer who alters, conceals, modifies, nullifies, or destroys, or causes to be altered, concealed, modified, nullified, or destroyed the face of the remaining original or any copy of a citation that was retained by the officer, for any reason, before it is filed with the processing agency or with a person authorized to receive the deposit of the parking penalty, is guilty of a misdemeanor.

(d) If, during the issuance of a notice of parking violation, without regard to whether the vehicle was initially attended or unattended, the vehicle is driven away prior to attaching the notice to the vehicle, the issuing officer shall file the notice with the processing agency. The processing agency shall mail, within 15 calendar days of issuance of the notice of parking violation, a copy of the notice of parking violation or transmit an electronic facsimile of the notice to the registered owner.

(e) If, within 21 days after the notice of parking violation is attached to the vehicle, the issuing officer or the issuing agency determines that, in the interest of justice, the notice of parking violation should be canceled, the issuing agency, pursuant to subdivision (a) of Section 40215, shall cancel the notice of parking violation or, if the issuing agency has contracted with a processing agency, shall notify the processing agency to cancel the notice of parking violation pursuant to subdivision (a) of Section 40215. The reason for the cancellation shall be set forth in writing. If, after a copy of the notice of parking violation is attached to the vehicle, the issuing officer determines that there is incorrect data on the notice, including, but not limited to, the date or time, the issuing officer may indicate in writing, on a form attached to

California Vehicle Code § 40202 (continued)

the original notice, the necessary correction to allow for the timely entry of the notice on the processing agency's data system. A copy of the correction shall be mailed to the registered owner of the vehicle. . . .

California Vehicle Code § 40203.5

(a) The schedule of parking penalties for parking violations and late payment penalties shall be established by the governing body of the jurisdiction where the notice of violation is issued. To the extent possible, issuing agencies within the same county shall standardize parking penalties.

(b) Parking penalties under this article shall be collected as civil penalties.

San Diego Municipal Code § 13.0402 (effective August 10, 1993)

Civil penalties collected pursuant to this Division shall be deposited in the Code Enforcement Civil Penalties Fund as established by the City Manager for the enhancement of the City's code enforcement efforts and to reimburse City Departments for investigative costs and costs associated with the hearing process that are not paid for by the Responsible Person. Civil penalties deposited in this fund shall be appropriated and allocated in a manner determined by the City Manager. The City Auditor shall establish accounting procedures to ensure proper account identification, credit and collection.

San Diego Municipal Code § 82.07 (effective March 18, 1991)

(a) Enforcement: Every police officer or non-sworn employee charged with the enforcement of the provisions of Chapter VIII of this Code relating to the illegal parking, the provisions of the California Vehicle Code, and the other laws of the State of California applicable to parking violations within the City of San Diego, shall have the duty when any vehicle is illegally parked, to issue a written notice of violation thereof stating the State vehicle license number, make of such vehicle, the time and date of such illegal parking, meter number, street location, and a reference to the appropriate section of the Code and fixing a time and place for appearance by the registered owner to answer said notice. Such notice shall be attached to aid vehicle either on the steering post or front door handle thereof or in such other conspicuous place upon the vehicle as to be easily observed by the person in charge of such vehicle upon his return thereto.

* * *

(c) Failure to Pay: Failure to pay the appropriate fee as provided herein or failure to request a court appearance date to contest the violation will result in legal proceedings being instituted in municipal Court of the San Diego Judicial District against the registered owner for violation of the appropriate Code section in accordance with the provisions of section 41102[1] of the Vehicle Code of the State of California.

---

[1] Repealed effective July 1, 1993.

http://www.dmv.ca.gov/about/profile/statistics.htm

Updated Data for 1999

Driver License and Identification Card Statistics
Source: DL Information Report 12/31/1998

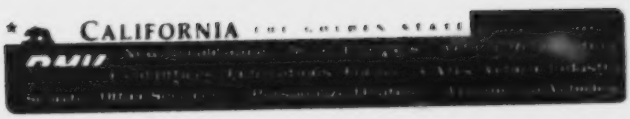
	Driver Licenses	
A.	Driver Licenses	20,735,472
	Identification (ID) Cards	
B.	ID Card Only	2,850,085
C.	Both ID and Driver License	2,888,264
D.	Under Age 16 ID Cards	104,066
E.	Senior Citizen ID Cards	917,349
F.	Total ID Cards	5,842,415 (Totals of B+C+D)
	Total Driver Licenses and IDs	23,689,623 (Totals of A+B+D)

http://www.dmv.ca.gov/about/profile/statistics.htm

Registered Vehicle Statistics
Source: Estimated Fee-Paid Vehicle Registration by County as of December 31, 1998

Automobiles	17,932,382
Motorcycles	397,032
Trucks	5,775,809
Trailers	3,005,910

Fee-Paid Registered	27,111,133
Exempt Registered	423,291
Total Registered:	27,534,424



Updated Data for 1999

Department Statistics

Number of Offices	Total	Additional Offices
Field Offices	170	2 Industry Service Centers, various Travel Runs, CDL Test sites, CRCs, Scale and Satellite offices are located at additional off-site locations
Driver Safety Offices	11	An additional 5 offices are located within various Field Offices
Telephone Service Centers	4	An additional 6 offices are located within various Field Offices & Headquarters
Investigations Offices	14	An additional 42 offices are located within various Field Offices & Headquarters
Occupational Licensing Offices	2	An additional 23 offices are located within various Field Offices, an Investigations office, and Headquarters
Employees	**Total**	**Type and Location**
Approximate Number of Employees	9,100	Includes full-time, temporary, permanent-intermittent, and part-time employees. Approximately 5,500 (60%) are in field, and approximately 3,600 (40%) are at Headquarters.

Driver License and Identification Card Statistics

Source: DL Information Report 12/31/1999

Driver Licenses

A.	Driver Licenses	20,735,472

Identification (ID) Cards

B.	ID Card Only	2,850,085

BEST AVAI

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Total Registered:	27,534,424

Average Fees by Basic Vehicle Type

Source: Statement of Transactions Summary Report-Department of Finance January 1998-December 1998

Fee	TRUCK (Commercial)	TRAILER (Commercial)	AUTO	MOTOR CYCLE
Weight Fee	$88	$65	$0	$0
Registration Fee*	$28	$28	$28	$28
CHP Fees	$2	$2	$2	$2
Vehicle License Fee**	$109	$16	$134	$49

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Total	$227	$111	$164	$79
Percent of all vehicles	19%	8%	71%	2%

Weighted average fee for all types of vehicles: $170

*Freeway Emergency Service Fee and other special fees vary by county and Air Quality District. Motorcycle registrations have an additional fee of $1 for the Motorcycle Safety Fund.

**The VLF (Vehicle License Fee) is 2% of value based on an 11 year, sliding depreciation scale with a $1 minimum (VLF reduces to 1.8% as of 1/1/00).

DMV Forecasting/MIS Section (916) 657-8008 March, 1999

- Estimated Fee-Paid Vehicle Registrations By County
- Driver Licenses Outstanding By County

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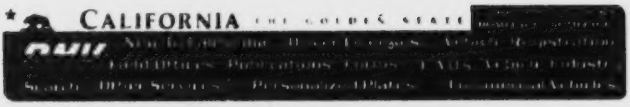

Department of Motor Vehicles

Drivers Licenses Outstanding by County

As Of December 31 of Years Listed

NOTE: The numbers shown on the report below reflect the database status on December 31, 1998, except for the 1995 numbers which are as of June 30, 1996.

Counties	1994	1995	1996	1997	1998
Alameda	866,100	878,600	883,500	899,400	915,700
Alpine	800	900	900	1,000	1,000
Amador	23,400	23,700	23,900	24,100	24,400
Butte	134,600	134,800	134,900	135,800	137,100
Calaveras	28,400	29,100	29,600	30,200	30,600
Colusa	11,800	11,900	11,800	12,000	12,000
Contra Costa	601,700	610,600	613,800	623,600	633,300
Del Norte	16,500	16,500	16,700	16,700	16,500
El Dorado	107,800	109,800	110,600	112,400	114,300
Fresno	418,000	426,100	426,600	434,300	438,400
Glenn	17,500	17,500	17,400	17,400	17,400
Humboldt	88,500	89,100	89,300	89,900	90,300
Imperial	76,300	77,900	78,500	79,400	80,300
Inyo	14,500	14,500	14,600	14,700	14,600
Kern	353,300	358,200	358,400	362,900	366,900
Kings	56,300	57,000	57,000	57,700	58,200
Lake	40,200	40,300	40,400	40,400	40,500
Lassen	18,200	18,600	18,800	18,900	18,800
Los Angeles	5,418,200	5,393,900	5,377,000	5,379,600	5,409,400
Madera	60,800	62,200	62,400	63,700	64,500
Marin	187,300	186,300	186,400	186,900	186,900
Mariposa	12,700	12,800	12,800	12,900	12,900
Mendocino	59,300	59,900	60,000	60,700	61,200
Merced	108,500	110,500	110,700	112,400	113,500
Modoc	6,700	6,600	6,500	6,500	6,500

Mono	7,900	8,000	7,900	8,100	8,100
Monterey	221,600	221,000	221,300	224,500	227,400
Napa	81,200	82,500	82,600	83,900	84,800
Nevada	66,700	68,900	69,500	70,900	72,300
Orange	1,800,500	1,807,600	1,810,600	1,828,300	1,854,000
Placer	150,800	156,600	158,500	164,000	170,000
Plumas	16,500	16,500	16,500	16,600	16,600
Riverside	820,300	836,600	839,600	854,300	874,300
Sacramento	726,800	734,200	735,700	745,000	755,800
San Benito	25,000	26,500	27,100	28,700	30,100
San Bernardino	949,800	955,600	955,200	962,700	973,700
San Diego	1,730,200	1,733,400	1,737,100	1,767,600	1,802,900
San Francisco	478,600	488,000	491,100	498,200	504,100
San Joaquin	293,600	299,500	301,300	306,900	313,700
San Luis Obispo	156,200	158,600	159,600	162,500	165,100
San Mateo	479,800	484,400	486,200	491,100	495,000
Santa Barbara	257,800	258,200	258,600	260,700	262,200
Santa Clara	1,103,200	1,121,600	1,127,600	1,141,900	1,155,800
Santa Cruz	164,300	165,300	165,900	169,000	170,800
Shasta	113,600	114,600	114,400	115,300	116,200
Sierra	2,500	2,500	2,500	2,500	2,600
Siskiyou	34,400	34,600	34,600	34,700	34,700
Solano	230,900	232,100	232,700	235,000	239,000
Sonoma	292,700	299,900	301,700	307,800	313,700
Stanislaus	252,000	255,400	255,900	259,900	263,800
Sutter	48,100	48,900	49,100	49,700	50,400
Tehama	35,300	35,100	35,300	36,000	36,500
Trinity	10,000	10,000	9,900	9,800	9,800
Tulare	188,600	191,500	191,700	195,400	196,800
Tuolumne	36,800	37,400	37,600	37,900	38,200
Ventura	477,300	482,500	483,300	489,400	495,100
Yolo	97,000	97,600	97,800	98,800	100,100
Yuba	37,700	37,400	37,200	36,800	36,700
All Counties	20,118,100	20,149,200	20,278,100	20,487,400	20,735,500
% Change from prior year		-0.7%	0.1%	1.0%	1.2%
ID Cards Outstanding	5,549,181	6,321,973	6,163,133	5,913,682	5,842,415
% Change from prior year		13.9%	-2.5%	-4.0%	-1.2%

March 1999

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THE CITY OF SAN DIEGO

April 20, 2000

Keith Ruitman
2442 4th Ave
San Diego, CA 92103

Dear Mr. Ruitman

I am responding to your request for a copy of the report specified in Vehicle Code Section 40200.3 regarding the "number of cases processed" and all sums received and distributed.

Our office does not produced a cumulative report as described. However, the following is a compilation of the information requested. The information provided is for fiscal year 1999 (July 1998 through June 30, 1999).

Number Citations - Citations submitted to our office for processing.
Gross Revenue - Total amount of Revenue Collected from Citations.
Net Revenue - Gross Revenue less deductions for returned checks and adjustments.
Distributions - State mandated distributions or payments to DMV for citation processing.
Admin Fees - Fees charged to outside agencies for processing their citations.
Agency Revenue - Net amount of revenue from citations deposited to City Account.

Number Citations	Gross Revenue	Net Revenue	Distributions -	Admin Fees -	Agency Revenue
State Parks and Recreation - Agency A					
2,086	86,988.69	86,164.69	18,428.01	22,532.61	45,204.07
San Diego PD - South Bay					
508	29,366.20	29,111.20	15,778.80		13,332.40
San Diego Community Schools					
30	1,291.00	1,232.00	411.00	280.30	660.70

Parking Management Division • Transportation
P.O. Box 129038 • San Diego, CA 92112-9038
Tel. 619.685.4075 Fax 619.685.1405

Number Citations	Gross Revenue	Net Revenue	Distributions	Admin Fees	Agency Revenue
Metropolitan Transit Development Board					
196	13,321.30	13,127.30	2,042.00	3,738.39	7,346.91
San Diego City Schools					
653	27,768.85	27,543.85	5,822.00	8,254.50	13,467.35
City of San Diego Disabled Volunteers					
2,238	694,519.46	659,079.46	207,979.30		451,100.16
City of San Diego Street Sweepers					
55,403	2,306,845.76	2,290,537.76	287,896.00		2,002,641.76
California Highway Patrol					
8	787.00	787.00	202.00	11.10	573.90
City of San Diego Parking Enforcement					
264,560	10,924,226.37	10,835,058.05	2,756,716.56		8,078,341.49
Amtrack Police					
1	340.00	340.00	107.00		233.00
California State Police					
7	219.00	219.00	70.00		149.00
City of San Diego Lifeguards					
102	6,146.00	5,861.00	730.00		5,131.00
Mission Bay Police					
208	10,453.00	10,391.00	2,552.00	2,749.30	5,089.70
San Diego Port District - Traffic Enforcement Office					
10,409	583,065.35	574,848.35	85,695.74	107,613.57	381,539.04
City of San Diego Fire Department					
112	8,329.00	8,249.00	1,041.00		7,208.00

Number Citations	Gross Revenue	Net Revenue	Distributions	Admin Fees	Agency Revenue
San Diego Port District - Port Police					
517	32,462 82	31,910 82	4,743 00	5,976 91	21,190 91
United States International University					
249	12,860 87	12,770 87	1,515 00	3,376 76	7,879 11
City of San Diego Parking Meter Repair Shop					
5,741	175,733 46	174,701 46	26,578 00		148,123 46
San Diego PD					
42,574	2,289,271 25	2,264,345 25	725,021 21		1,539,324 04
San Dieguito School Dist					
333	12,828 00	12,798 00	2,329 00	3,140 70	7,328 30
National University					
167	11,656 77	11,356 77	2,207 00	2,744 93	6,404 84
San Diego PD - RSVP Officers					
56	16,725 00	16,375 00	5,248 50	744 00	10,382 50
City of San Diego Park Rangers					
838	41,027 75	40,797 75	5,322 00		35,475 75
Mount Carmel High School					
345	15,250 69	15,145 69	1,727 00	4,025 61	9,393 08
City of San Diego Zoning					
1	36 00	36 00	5 00	-	31 00
Handwritten Citations where the issuing agency could not be determined					
772	46,327 99	45,346 99	5,963 00		40,786 99

I hope this information is helpful. Should you have any additional questions regarding the information presented, please contact me at (619) 685-1448.

Sincerely,

Daniel Dickel

Daniel Dickel
Technical Services Coordinator

cc: Mary Rea, Transportation Department Deputy Director

FILED
JUL 24 2000
CLERK

(3)

No. 99-1859

IN THE

Supreme Court of the United States

ALMA ROMERO,

Petitioner,

v.

JOSEPH LOPEZ and THE CITY OF SAN DIEGO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

CHERYL A. MANNIE*
Deputy
CASEY GWINN
City Attorney
ANITA M. NOONE
Assistant City Attorney
1200 Third Avenue
Suite 1100
San Diego, CA 92101
(619) 533-5800

* *Counsel of Record*

Attorneys for Respondents

161083

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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STATEMENT OF THE CASE

On December 3, 1996, at approximately 2:30 p.m., San Diego Police Officer Joseph Lopez, a twenty-one year veteran at the time, noticed Petitioner Alma Romero's car illegally parked in a red zone near 900 Broadway Circle in the City of San Diego. Petitioner was loading luggage into her car when Officer Lopez pulled alongside Petitioner's car on his marked patrol motorcycle and informed Petitioner that it was a violation of the law to park in the red zone. Instead of moving her car, Plaintiff angrily approached Officer Lopez and exclaimed, "I'm tired, I've come a long way and I don't have time for this!" Officer Lopez concluded, based on Petitioner's verbal response and physical reactions, that she was not going to move her car.

Officer Lopez decided to issue a parking citation. He parked his motorcycle in front of Petitioner's car and retrieved his citation book from his saddlebag. He started to look at Petitioner's car in order to record the information needed for the citation. At that time, Officer Lopez had not instructed Petitioner, by words or gestures, that she was being detained. Petitioner was free to leave, but her car was not. Officer Lopez was unable to record any information about the car before his attention was drawn back to Petitioner.

Petitioner had slammed her trunk closed and walked back to the driver's door. Officer Lopez told Petitioner not to move the car. Petitioner responded by saying, "I'm leaving." Petitioner then entered her car and slid into the driver's seat. Officer Lopez again told Petitioner that she could not move the car. Plaintiff ignored Officer Lopez's orders and began to move the car in reverse. Officer Lopez tapped on the hood as Petitioner started to back away. Officer Lopez caught up

to the driver side of the car and tapped on the window, telling Petitioner to stop the car. Petitioner did not stop her car until she was forced to do so by the presence of a vehicle which had come to a stop directly behind her. Officer Lopez told Petitioner to turn off the ignition and get out of the car. Petitioner said, "No!" and motioned for the driver of the car behind her to move out of her way, telling him, "Move!" Officer Lopez then opened the driver's door, turned off the ignition switch, and arrested Petitioner.

Petitioner's questions being presented for review stem from the Ninth Circuit Court of Appeals' affirmation of the district court's rulings on a motion for summary judgment and a motion for judgment as a matter of law. Both of these motions relate to Petitioner's contention that she had a constitutional right to move her car despite Officer Lopez's instructions that the car remain at the scene for the few moments needed to obtain the information necessary for a parking citation, and that she was constitutionally protected from criminal prosecution for moving her car during those moments. The Ninth Circuit rejected these contentions, stating:

> The success of this argument depends on whether she had the right to flee the scene with her vehicle under California Vehicle Code § 40202. She has failed to establish such a "right." Section 40202 is silent on whether a driver has the right to take a vehicle while an officer is attempting to issue a citation involving it, and Romero offers no other authority authorizing the removal of a vehicle in this circumstance.

Pet., App. at A-5.

Thus, the Ninth Circuit rejected Petitioner's contention that the Fourth Amendment prohibited Officer Lopez's detention of Petitioner's car. That court also rejected Petitioner's contention that the Fourth Amendment precluded Officer Lopez from arresting Petitioner for moving her car while he was attempting to prepare the parking citation. Petitioner now seeks this Court's review of the Ninth Circuit's rejections of her contentions.

REASONS FOR DENYING THE WRIT

I. STANDARD OF REVIEW

This Court issues a writ of certiorari only for "compelling reasons." Rules of the Supreme Court of the United States, Rule 10(a). In evaluating a petition for certiorari, this Court considers whether

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Rule 10(a)(1).

In this case, Petitioner asks this Court to review the Ninth Circuit Court of Appeal's affirmation of a district court's denial of Petitioner's motion for summary judgment and motion for judgment as a matter of law. Petitioner has, however, failed to show that there is a "compelling reason" for this Court to review the case. She has failed to show that

the denial of Petitioner's motions conflicted with other courts of appeal's decisions, or that the denial of Petitioner's motions "so far departed from the accepted and usual course of judicial proceedings" that a writ of certiorari is warranted. Absent such a showing, Petitioner's petition for writ of certiorari must be denied.

II. THERE IS NO COMPELLING REASONS FOR THIS COURT TO REVIEW THIS CASE

This Court grants review on certiorari only for "compelling reasons." Rules of the Supreme Court of the United States, Rule 10. Absent any compelling reasons, the holdings of the court below are not subject to review.

A. The Decision Of The Ninth Circuit Court Of Appeals Does Not Conflict With The Decisions of Any Other Courts

Petitioner contends that the Ninth Circuit Court of Appeals, in affirming the district court's rulings, "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Pet. at 2. Petitioner, however, fails to identify any conflicts. She fails to identify any decisions which: (a) hold as unconstitutional a police officer's instruction that a vehicle momentarily remain in place while identifying information is obtained for the issuance of a parking citation; or (b) hold that a person is immune from criminal prosecution when refusing to comply with a police officer's instructions that a vehicle not be moved when such identifying information is sought.

Plaintiff contends that the Fourth Amendment prohibits the detention of an automobile by a police officer for the purpose of gathering information necessary to issue a parking citation. In support of this contention, Petitioner's cites numerous authorities in her Petition for Writ of Certiorari, but each authority cited for this contention deals solely with the detention or arrest of individuals. Petitioner fails to provide any authority which suggests that the law stated in these cases may be properly analogized to a situation involving the brief detention of personal property which is the subject of the exercise of a police officer's duty. Instead, Petitioner's authorities only address situations where law enforcement officers made traffic stops, detaining individuals who happened to be in vehicles, or otherwise involving invasive searches inside such vehicles.

The facts of the subject case are clearly distinguishable from the facts of the cases cited by Petitioner. Petitioner was not inside her vehicle, and the vehicle was not moving, when Officer Lopez decided to cite it. Her vehicle was never searched. Further, until her arrest for the violation of Penal Code section 148, Petitioner herself was free to leave the scene of the incident. While there are instances where the detention of a vehicle does rise to the level of a detention of the occupants of the vehicle, here there were no occupants of the vehicle when Officer Lopez began the process of writing the parking citation. Officer Lopez needn't have developed probable cause or reasonable suspicion with regard to Petitioner when he detained the vehicle. Petitioner was not part of the detention. She was not detained or arrested until she interfered with Officer Lopez's attempts to carry out his duties. Because Petitioner's authorities do not address the facts particular to this matter, Petitioner has failed to meet her burden of showing a conflict with other court

decisions. Because no conflicts have been identified, Petitioner may not rely on conflicting court decisions as an element making this case appropriate for review.

B. The Ninth Circuit Did Not Depart from the "Accepted and Usual Course of Judicial Proceedings" by Affirming the Lower Court Judgment

When considering a case for review, the Court considers whether the court of appeals departed from the "accepted and usual course of judicial proceedings" or sanctioned such a departure by the lower court. Rules of the Supreme Court of the United States, Rule 10(a).

Petitioner contends that she had a right to flee the scene with her vehicle. She did not, however, provide the district court with any authority for such a contention. She also failed to provide the Ninth Circuit with such authority. This Court has long held that persons asserting Fourth Amendment violations have the burden of establishing that such rights have been violated. *Rakas v. Illinois*, 439 U.S. 128 (1978). Thus, Petitioner had the burden of proving that the detention of her car was illegal. Because Petitioner never established the illegality of the claimed violation, the Ninth Circuit had no legal basis for recognizing the detention of Petitioner's car as a violation of Petitioner's rights. In refusing to grant Petitioner the relief she sought, the Ninth Circuit was, in fact, consistent with "the accepted and usual course of judicial proceedings." It would have departed from such course only if it had granted Petitioner's appeal in the light of her failure to establish legal grounds for her contentions. Petitioner has not met her burden of showing that the Ninth Circuit deviated from the "accepted and usual course of judicial proceedings" and as such, she may not use such a contention as a compelling reason for granting review.

III. NONE OF THE CASE LAW CITED BY PETITIONER SUPPORTS THE ISSUANCE OF THE WRIT OF CERTIORARI

As Petitioner has acknowledged, the key issue before this court is whether a person has the right to flee with his or her vehicle when a police officer is in the process of citing that vehicle for a parking violation and that officer instructs the driver to refrain from moving the vehicle while information for the citation is being gathered. Plaintiff has failed to establish that such a right exists, a fact clearly identified by the Ninth Circuit when affirming the district court's decisions. Petitioner continues to contend that such a right exists, but also continues to fail to identify any authority supporting this contention. As stated above, the cases cited by Petitioner are distinguishable from the subject case in that they do not address the core question of whether an officer may detain a vehicle to obtain identifying information. The cases cited by Petitioner only address situations where individuals were detained or arrested, where invasive searches were conducted. In contrast to the facts contained within Petitioner's cited cases, Officer Lopez did not initiate contact by pulling Petitioner over and searching her person or vehicle. Rather, Officer Lopez personally witnessed a parked vehicle violating local parking regulations and sought to issue a citation on the vehicle only after Petitioner made it clear that the violation would continue. Until Petitioner attempted to drive away, she was not "stopped." By then, of course, she was "stopped" not for the parking violation, but instead for her violation of California Penal Code section 148.

There is no true implication of Fourth Amendment rights in this matter because the governmental interest (penalizing individuals who break parking laws) served by a brief detention of the vehicle clearly outweighs Petitioner's interest in allowing lawbreakers absolute freedom to escape punishment for illegal parking. No constitutional rights are implicated by a minimal intrusion which has a limited objective, a legitimate purpose, and takes place under exigent circumstances, particularly when there is no other practical way to accomplish the objective. "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). While the subject incident certainly did not result in a search of Petitioner's car, and only possibly rose to what could arguably be considered a seizure, the context of the detention was such that Officer Lopez needed the car to remain in place for the few moments necessary for him to write down identifying information. In that context, his actions were reasonable, and were clearly justified by his duty to enforce violations of the law, particularly those he witnessed with his own eyes. "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order." *Id.* Petitioner breached the public order by parking her car in a red zone and refusing to move it when instructed to do so by Officer Lopez. The officer's "effective method" of dealing with the breach was to prevent the car from leaving the scene for the minimal time it took to gather the information necessary to issue a citation.

In balancing the Fourth Amendment privacy protections against official intrusions, this Court stated, "it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security to advance the community's vital interests in law enforcement." *Winston v. Lee*, 470 U.S. 753, 759 (1985). Minimal intrusions, "reasonably related in scope to the justification for their initiation" especially in absence of practical alternatives, may certainly be legitimately performed without violating of Fourth Amendment rights. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975).

Officer Lopez's brief detention of Petitioner's vehicle certainly did not rise to the level of the searches and seizures which are the subject of the cases cited by Petitioner. One can hardly imagine a less intrusive detention. As such, Petitioner's cited authorities are distinguishable from the facts particular to this case and thus have no bearing on whether this case is appropriate for review.

Petitioner also contends that the Fourth Amendment operates as a restriction on police officers detaining illegally parked vehicles unless basis for the detention is derived from California Vehicle Code section 22651. Pet. at 13. Petitioner, however, fails to provide any case law which suggests that this code section is applicable to the subject case. Section 22651 grants to police officers the power to *remove* a vehicle under certain specified circumstances. Pet., App. at A-37. While there are indeed a number of circumstances where an officer may remove an illegally parked vehicle from where it is situated, none of them are relevant to this case because Officer Lopez never *removed* Petitioner's car. He never made any attempt to have it towed, impounded, or otherwise removed from the illegal parking space. Petitioner fails to

provide any authority which suggests that Officer Lopez's instructions to Petitioner to *not* move the vehicle from the illegal parking space while he issued the citation rises to the level of a "removal." At most, Officer Lopez simply sought to detain the vehicle briefly for the sole purpose of preparing the parking citation.

IV. THE EXISTENCE OF MATERIAL FACTS IN DISPUTE PRECLUDE JUDGMENT IN FAVOR OF PETITIONER

Petitioner contends that there are sufficient undisputed material facts to support summary judgment in her favor. The district court found otherwise, and the Ninth Circuit correctly affirmed the district court's ruling. Petitioner nevertheless continues on the same path, though with no stronger authority.

Petitioner has listed as an undisputed fact, "[t]he information Respondent Lopez was required to obtain by the Municipal/Vehicle Codes was visible, i.e., not obstructed from view." Pet. at 8. Respondents conceded, and still do, that this is indeed an undisputed fact. The license plate number, the last four digits of the vehicle identification number, and the registration expiration date, all were visible to Officer Lopez, *but only prior to Petitioner's attempts to drive the car away*. Petitioner refuses to acknowledge that when she started driving the vehicle away from the scene, she was removing all of those pieces of information from the officer's view. So, while it is true that the information was visible at one time, the officer's duty became impossible to perform once the car was moved and the information disappeared from sight. Because Petitioner purposefully interfered with Officer Lopez in the performance of his duty,

her arrest for violating Penal Code section 148 was appropriate, and the denial of her motion for summary judgment was correctly affirmed by the Ninth Circuit.

In a similar vein, Petitioner also contends that Officer Lopez could not lawfully direct her to not move the car. Pet. at 18. This contention is based, at least in part, on Petitioner's reliance on Respondents' concession that the information Officer Lopez was required to obtain to write the parking citation was visible, i.e., not obstructed from view. Respondents do concede that the information was visible, but again, *only while the car was stationary.* Officer Lopez had to detain the car or otherwise lose the opportunity to perform his duty of issuing a citation. Petitioner fails to acknowledge that by moving the car, Petitioner was in fact removing the car from the officer's view. If Petitioner had been allowed to drive the vehicle away, Officer Lopez would have had no practical opportunity to obtain the last four digits of the car's vehicle identification number or the license plate number, and thus would have been unable to identify the vehicle for parking citation purposes. To suggest that the officer could have completed his inspection of the car and obtained the necessary identifying information while Petitioner was driving away is ludicrous. Petitioner's contentions can only lead to the illogical conclusion that Officer Lopez chasing Petitioner's fleeing vehicle though crowded streets to get her license plate number is preferable to the minimally invasive act of detaining the vehicle for a momentary external inspection. The Ninth Circuit rejected that illogical conclusion and there is no compelling reason for this Court to review that decision.

CONCLUSION

The Ninth Circuit acted properly by affirming the district court's denial of Petitioner's summary judgment motion and motion for judgment as a matter of law. Petitioner offers no convincing arguments or applicable case law which suggests that the Ninth Circuit erred in any respect. Thus, this case raises no significant issue warranting this Court's review. For all of the reasons set forth above, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

CHERYL A. MANNIE*
Deputy
CASEY GWINN
City Attorney
ANITA M. NOONE
Assistant City Attorney
1200 Third Avenue
Suite 1100
San Diego, CA 92101
(619) 533-5800

Attorneys for Respondents

* *Counsel of Record*